Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DOROTHY A. MARELLO,

Petitioner,

v.

CENTRAL RESERVE LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513, 522-23, 148 L.Ed.373 (2000), this Court left open "how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence . . ." and whether, in the absence of a severance clause, courts should nevertheless compel arbitration and sever or rewrite the offending arbitration provision or, declare the entire arbitration provision invalid and allow the litigants to proceed to court. Petitioner's case provides the Court with the opportunity to provide concrete direction to divergent lower courts struggling with the method and sufficiency of proof, while allowing the Court to resolve with finality the issue of whether courts should sever and/or rewrite the offending provision and compel arbitration, strike the provision in its entirety; or undertake a case-by-case analysis to determine the best course of action dependent upon the individual circumstances of the litigants.

I. How detailed of a showing must a consumer make before sufficiently demonstrating that arbitration is cost prohibitive under *Green Tree*?

II. May a court deny a consumer's request for limited discovery or an evidentiary hearing regarding the costs, procedures, or remedies associated with arbitration, and preclude the consumer from using judicial proceedings to collect the information necessary to demonstrate whether the arbitral forum will effectively vindicate statutory rights?

III. In the absence of a severance clause, should courts sever or rewrite offending arbitration provisions, strike the arbitration provision in its entirety, or decide on a case-by-case basis how best to remedy the provision dependent upon the circumstances of the parties.

IV. Should the District Court have entered an Order compelling a consumer to arbitrate her statutory claims after a state trial court had previously denied the insurance company's request to compel arbitration, and the insurance company had already appealed that judgment to the State's court of review?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT 1

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 10

CONCLUSION 26

APPENDIX

CIRCUIT COURT ORDER (12/20/01) 1a

ORDER DENYING REHEARING (2/26/02) 3a

CIRCUIT COURT JUDGMENT (12/20/01) 5a

DISTRICT COURT OPINION (10/3/00) 7a

DISTRICT COURT OPINION (1/17/01) 15a

COURT OF COMMON PLEAS ORDER (9/20/00) 26a

TABLE OF AUTHORITIES

CASES

ALLIED-BRUCE TERMINIX COMPANIES, INC. v. DOBSON, 513 U.S. 265 (1995) 11

ARAKAWA v. JAPAN NETWORK GROUP, 56 F.SUPP.2D 349, 354-55 (S.D.N.Y.1999) 17

BALL v. SFX BROADCASTING, INC. , NO. 00-1090, 2001 WL 1048556 AT *7, 165 F.SUPP.2D 230, 86 FEP CASES 991 (N.D.N.Y. AUG. 21, 2001) 18

BLAIR v. SCOTT SPECIALTY GASES, 283 F.3D 595, 608-09 (3RD CIR. 2002) 20

BOYD v. THE TOWN OF HAYNEVILLE, ALABAMA, 144 F.SUPP.2D 1272, 1280 (M.D. ALA. 2001) 15, 16

CAMACHO v. HOLIDAY HOMES, INC., 167 F.SUPP.2D 892, 897 (W.D. VA. 2001) 16, 18, 22

DABNEY v. OPTION ONE MORTGAGE CORPORATION, NO. 00-5831, 2001 WL 410543, AT *3 (E.D. PA. 2001) 16

DISTRICT OF COLUMBIA COURT OF APPEALS v. FELDMAN, 460 U.S. 462, 476 (1983) 26

FLIGHTWAYS CORP. v. KEYSTONE HELICOPTER, 331 A.2D 184, 459 PA. 660 (1975) 25

GANNON v. CIRCUIT CITY STORES, INC. , 262 F.3D 677, 680-81, 86 FEP CASES 755 (8TH CIR. 2001) 21

GILMER v. INTERSTATE/JOHNSON LANE CORP., 500 U.S. 20, 26 (1991) 11

GIORDANO v. PEP BOYS–MANNY, MOE & JACK, NO. 99-1281, 2001 WL 484360 (E.D. PA. MARCH 29, 2001) 19, 20, 21

GRAHAM OIL CO. V. ARCO PRODUCTS CO., 43 F.3D 1244, 1249 (9TH CIR. 1994) 23

GREEN TREE FINANCIAL CORP.-ALABAMA V. RANDOLPH, 531 U.S. 79, 92, 121 S.CT. 513, 522-23, 148 L.ED.373 (2000) . 10, 12, 15, 16

HOOTERS OF AMERICAN, INC. V. PHILLIPS, 173 F.3D 933, 940 (4TH CIR. 1999) 22

KLINEDINST V. TIGER DRY LAC U.S.A., INC., 2001 WL 151821, * 14 (D.N.H. 2001) 17

KOVELESKIE V. SBC CAPITAL MARKETS, INC., 167 F.3D 361, 366 (7TH CIR.1999) CERT. DENIED, 528 U.S. 811, 120 S. CT. 44, 145 L. ED. 2D 40 (OCT. 4, 1999) 17

LAMBERT V. BLACKWELL, 134 F.3D 506, 513 N. 18 (3RD CIR. 1997) 26

LANGSTON V. NATIONAL MEDICAL CORP., 420 PA. SUPER. 611, 615-16, 617 A.2D 354, 356 (1992) 24

LIVINGSTON AND ASSOCIATES FINANCING, INC. 2001 WL 709465 AT *2 (N.D. ILL. JUNE 25, 2001) 20

MANUEL V. HONDA RND AMERICA'S, INC., 175 F.SUPP.2D 987 (S.D. OH. 2001) 17

MASTROBUONO V. SHERSON LEHMAN HUTTON, INC., 514 U.S. 52, 56, 115 S.CT. 1212, 1215, 131 L.ED. 2D 76 (1995) 12

MENDEZ V. PALM HARBOR HOMES, INC., NO. 20317-4-III, __ P.3D __, 2002 WL 826409 (WASH. APP. DIV. 3 2002) 12, 19

MITSUBISHI MOTORS CORP. V. SOLER CHRYSLER-PLYMOUTH, INC., 473 U.S. 614, 628 (1985) 11

OLDE DISCOUNT CORPORATION V. TUPMAN, 1 F.3D 202, 215 (3D CIR. 1993) 25

PEREZ V. GLOBE AIRPORT SECURITY SERVICES, INC., 253 F.3D 1280, 1286-87 86 FEP CASES 613 (11TH CIR. 2001) 22, 23

PHILLIPS V. ASSOCIATES HOME EQUITY, NO. 01-944, 2001 WL 1159216 AT *4-5 (N.D. ILL. SEPT. 28, 2001) 16, 18

QUINN V. EMC CORP.,109 F.SUPP.2D 681, 685-86, 83 FEP CASES 1089 (S.D. TEX. 2000) 21

ROOKER V. FIDELITY TRUST CO., 263 U.S. 413(1923).....26

ROSE V. LUNDY, 455 U.S. 509, 518, 102 S. CT. 1198, 1203, 71 L. ED.2D 379 (1982) 26

ROSENBERG V. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., 170 F.3D 1, 15-16 (1ST CIR.1999) 17

SPINETTI V. SERVICE CORP. INTERN., NO. 01-1191, 2001 WL 1781921, 87 FAIR EMPL.PRAC.CAS. (BNA) 1707 (W.D.PA NOV. 15, 2001).....18, 20, 21

SYDNOR V. CONSECO FINANCIAL CORP, 252 F.3D 302 (4TH CIR. 2001).....17

TING V. AT & T, 182 F.SUPP.2D 902, 933-35 (N.D.CAL.2002)....18

VOLT INFO. SCIENCES, INC. V. BOARD OF TRUSTEES OF LELAND STANFORD, JR., UNIV., 489 U.S. 468, 479 (1989) 23, 25

ZUMPANO V. OMNIPOINT COMMUNICATIONS, CIV. NO. 00-595, 2001 WL 43781 AT *12, 84 FEP CASES 1592 (E.D. PA. JAN. 18, 2001).....21

STATUTES

9 U.S.C. ¶ 10.....17

9 U.S.C. § 3 .....2, 25

9 U.S.C. § 4 .....2, 25

28 U.S.C. § 1254 1

28 U.S.C. § 1257 9

28 U.S.C. § 1651(a) 9

28 U.S.C. § 2283 9

15 U.S.C.A. § 1012(b) 10

42 Pa. C.S.A. § 8371 ..... 3, 6

73 P.S. § 201-9.2 3

OTHER AUTHORITIES

Alderman, Richard, Pre-dispute Mandatory Arbitration In Consumer Contracts: A Call For Reform, 38 Hou. L. Rev. 1237, 1253 (2001)..... 12

Jean R. Sternlight, Forum Shopping For Arbitration Decisions: Federal Courts' Use Of Antisuit Injunctions Against State Courts, 47 U. Pa. L. Rev. 91, 116, n. 104..... 25

U.S. Const. Amend. XIV 1

OPINIONS BELOW

The February 26, 2002, decision of the United States Court of Appeals for the Third Circuit denying Petitioner's Sur Petition for Panel Rehearing and for En Banc Determination is set forth in the Appendix at 3a-6a. The Third Circuit's unreported Memorandum Opinion affirming the district court, dated December 20, 2001, is set forth in the Appendix at 1a-2a. The January 17, 2001, Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's Motion to Amend and Correct Pursuant to Fed. R. Civ. P. 59(e) is set forth in the Appendix at 15a-25a. The District Court's October 3, 2000, order compelling arbitration is set forth in the Appendix at 7a-14a. The September 20, 2000, order of the Court of Common Pleas of Lancaster County, Pennsylvania, denying Respondent's preliminary objections which sought to compel arbitration is set forth in the Appendix at 26a-27a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its Decision to deny Petitioner's Sur Petition for Panel Rehearing and for En Banc Determination on February 26, 2002.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Constitutional Provisions Involved

U.S. Const. Amend. XIV
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

P.A. Const. Art. §1
All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

P.A. Const. Art. §11
All courts shall be open; and every man for an injury done in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Statutory Provisions Involved

Federal Arbitration Act of 1925 - 9 U.S.C. § 3
If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Federal Arbitration Act of 1925 - 9 U.S.C. § 4
A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an

order directing that such arbitration proceed in the manner provided for in such agreement . . .

Pennsylvania's "Bad Faith" Statute. 42 Pa. C.S.A. § 8371
In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
(2) Award punitive damages against the insurer.
(3) Assess court costs and attorney fees against the insurer.

Pennsylvania's Unfair Trade Practices and Consumer Protection Law. 73 P.S. § 201-9.2.
Private actions:(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

STATEMENT OF THE CASE

Procedural History

On June 6, 2000, Petitioner Dorothy A. Marello filed suit against Central Reserve Life Insurance Company ("CRL") and insurance agent Timothy Nissly ("Nissly") in the Court of Common Pleas of Lancaster County, Pennsylvania, alleging that CRL and Nissly had violated Pennsylvania's "bad faith" insurance statute (42 Pa. C.S.A. §8371) and Unfair Trade Practices and Consumer Protection Law (73 Pa. S. § 201-1 *et seq.*), intentionally inflicted emotional distress and

fraudulently induced Ms. Marello to enter into an arbitration agreement.

On June 30, 2000, CRL initiated a separate suit in the United States District Court for the Eastern District of Pennsylvania based on diversity of citizenship between Ms. Marello and CRL, by filing a Petition to compel arbitration against Ms. Marello and excluding Defendant Nissly, a Pennsylvania resident, from that petition.

On July 5, 2000, CRL then filed its preliminary objections in the initial state court proceedings and sought to compel Ms. Marello to arbitrate her claims.

On July 26, 2000, Ms. Marello filed her response to CRL's Preliminary Objections in state court. On August 8, 2000, CRL filed its reply to Ms. Marello's response in state court.

On September 1, 2000, Ms. Marello filed a Motion to Dismiss CRL's Motion to Compel Arbitration in the district court and requested leave to conduct discovery.

On September 20, 2000, the state court judge denied CRL's preliminary objections which sought to compel arbitration. On September 27, 2000, CRL appealed to the Superior Court of Pennsylvania.

On October 2, 2000, Ms. Marello filed the state court's order, as well as CRL's state court objections and supporting memoranda, with the district court. On October 3, 2000, the district court granted CRL's Petition to Compel Arbitration, and enjoined Ms. Marello from proceeding in state court against either CRL and Nissly. The district court also denied Ms. Marello's discovery requests. On October 12, 2000, Ms. Marello filed a Motion to Amend and Correct the District Court's Order pursuant to Fed. R. Civ. P. 59. On January 17, 2001, the district court denied Petitioner's motion.

On February 8, 2001, Ms. Marello filed a timely Notice of Appeal in the United States Court of Appeals for the Third Circuit. On December 20, 2001, the Third Circuit affirmed the district court's order. On January 17, 2002, Ms. Marello filed her Sur Petition for Panel Rehearing and for En Banc Determination. On February 26, 2002, the Third Circuit denied her Petition for Panel Rehearing and for En Banc Determination. Petitioner now files a timely petition for a

writ of *certiorari*.

Statement of the Facts

In 1996, Central Reserve Life ("CRL") Insurance Company, an insurance corporation organized in Ohio and doing business in 43 states, advertised new benefits to the general public under their Eagle PPO Plan using the following text.

> Central Reserve Life Insurance Co. (CRL) recently announced significant new benefits to its insurance plans, in response to the ongoing advances in medical care technology. These new benefits include (1) A centers of Excellence Program for organ/tissue transplants. (2) The coverage of related procedures and equipment, such as certain *experimental procedures*, for example, bone marrow and/or special blood cell transplants .
>
> . .

In December, 1998, Dorothy A. Marello, a 56-year-old high school educated banquet waitress and Pennsylvania resident, sought to purchase a health insurance policy through the brokerage of Timothy S. Nissly ("Nissly"), a resident of Pennsylvania who specialized in insurance and employee benefits brokerage services for groups and individuals. Mr. Nissly recommended, and Ms. Marello thus purchased, CRL's "Eagle PPO Plan for Pennsylvania."

CRL's Eagle PPO Plan contains an arbitration provision on page 62 of the 67 page policy which states:

> After exhaustion of the Appeal of Decision procedures, any dispute arising out of or related to the policy that remains shall be settled by arbitration in accordance with applicable federal or state laws, and the Insurance Dispute Resolution Procedures, as amended, and administered by the American Arbitration Association.

In April 1999, after Ms. Marello purchased her Eagle PPO plan from CRL, a physician diagnosed her with primary amyloidosis, a clonal disorder involving excessive protein production in plasma cells that is fatal if left untreated. Despite Ms. Marello's initial treatment of a chemotherapy regimen, her protein count continued to increase. In response, Ms. Marello's physicians referred her to the Mayo Clinic, who recommended high dose chemotherapy with peripheral stem cell rescue, or "HDC/PSCR". CRL denied coverage, however, asserting that HDC/PSCR was not a generally accepted medical treatment in the United States for primary amyloidosis. In January 2000, Ms. Marello and her treating physicians wrote separate letters to CRL appealing its decision to deny Ms. Marello's treatment. CRL denied the appeal.

In March of 2000, a claims administrator for CRL contacted Ms. Marello's physicians to inquire whether Ms. Marello was willing to go to a CRL network provider for treatment instead of the Mayo Clinic because the cost to CRL for the HDC/PSCR treatment would be lower if provided by the network provider. Ms. Marello expressed a willingness to have HDC/PSCR at CRL's network provider, but a CRL appeals manager subsequently wrote to one of Ms. Marello's physicians in May 2000, and advised that CRL had again determined that the proposed treatment was experimental, investigational, and not generally accepted in the United States and thus was not covered.

On June 6, 2000, Ms. Marello filed a four-count complaint in the Court of Common Pleas of Lancaster County, Pennsylvania, alleging that CRL and Nissly had violated Pennsylvania's "bad faith" insurance statute (42 Pa. C.S.A. §8371) and Unfair Trade Practices and Consumer Protection Law (73 Pa. S. § 201-1 *et seq.*), intentionally inflicted emotional distress and engaged in fraud. The complaint sought statutory remedies specifically available under Pennsylvania law (e.g., prejudgment interest, punitive or treble damages, attorneys' fees) and a preliminary injunction requiring CRL to provide coverage for the HDC/PSCR procedure. On June 7, 2000, one day after Ms. Marello filed her complaint in state court, CRL offered to

cover the procedure for "humanitarian reasons" only, while reserving all possible defenses, including Ms. Marello's repayment of costs of treatment.

On June 29, 2000, CRL initiated litigation against Ms. Marello in the United States District Court for the Eastern District of Pennsylvania by filing a Petition to compel arbitration and stay all state court proceedings. CRL then filed its preliminary objections in the pending state court proceedings on July 5, 2000, and specifically sought to compel Ms. Marello to arbitrate her claims pursuant to the mandatory arbitration provision included on page 62 of CRL's 67 page insurance policy. Shortly thereafter, Ms. Marello filed a state court response and CRL filed a state court reply.

On September 1, 2000, Ms. Marello filed a Motion to Dismiss CRL's Motion to Compel Arbitration in the district court and requested leave to conduct discovery. Ms. Marello's Motion to Dismiss argued that: (1) sufficient and appropriate grounds existed for the district court to abstain from exercising jurisdiction on the matter; (2) the arbitration provision was invalid and/or unenforceable due to fraud and impossibility as a result of AAA's abandonment of its Insurance Dispute Resolution Procedures; (3) arbitration did not provide an adequate forum to vindicate Ms. Marello's claims because the statutory claims either could not be arbitrated or failed to include the remedies available under Pennsylvania law; (4) the cost of arbitration prevented her from pursuing her claims, thereby violating Ms. Marello's state and federal constitutional rights to due process; and (5) Ms. Marello did not make a knowing and voluntary waiver of her constitutional and statutory rights.

Although Ms. Marello argued that discovery or an evidentiary hearing was necessary for her to conclusively demonstrate that she could not effectively vindicate her statutory rights in the arbitral forum, she also supported her argument of prohibitive costs by (1) citing to deposition evidence demonstrating that she was a 56-year-old unemployed banquet waitress that owed thousands of dollars to the Mayo Clinic and had been living on Social Security due to disability resulting from her disease; (2) submitting bills from another case that CRL had previously arbitrated

regarding the denial of HDC/PSCR coverage in which the insured had to pay more than $5,000 for two days of arbitration, even though the case had settled before arbitration had been completed; (3) filing a letter with the district court from AAA advising that the arbitration costs and expenses (i.e., in addition to fees) in Ms. Marello's case would be $5,400 per day for a panel of three arbitrators, and, (4) submitting the AAA's Insurance Dispute Resolution Procedures, AAA's Consumer Dispute Resolution Procedures, and CRL's Alternative Dispute Resolution Procedures, and listing in her memorandum of law in detail the fees and costs associated with proceeding under each. Moreover, CRL did not contest either the authenticity or foundation of these submissions in the district court.

On September 20, 2000, the state court judge denied CRL's preliminary objections, finding in part that it was "unclear from the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff." On September 27, 2000, CRL appealed to the Superior Court. On October 2, 2000, Ms. Marello filed the state court's orders with the district court.

On October 3, 2000, the district court granted CRL's Petition to Compel Arbitration, and enjoined Ms. Marello from proceeding in state court against either CRL or Nissly. The district court initially found that no grounds existed to justify abstention and that the state court's dismissal of CRL's preliminary objections requesting that the State court compel arbitration was not a final order and, therefore, not entitled to any deference by the district court. The district court also found, based only on representations made in CRL's reply memorandum, that the Insurance Dispute Resolution Procedures referred to in the insurance policy still remained in effect and, therefore, compliance with them was clearly possible. The district court concluded by finding that Ms. Marello's statutory fraud and bad faith claims were arbitrable under Pennsylvania law. The district court failed to directly address, however, any of Ms. Marello's issues regarding prohibitive costs.

On October 12, 2000, Ms. Marello filed a Motion to Amend and Correct the District Court's Order pursuant to

Fed. R. Civ. P. 59. The Motion argued in part that: (1) the district court erred when it denied Ms. Marello's request for an evidentiary hearing pursuant to Fed. R. Civ. P. 12(d) to ascertain what rules, costs, and remedies would apply to the disputed arbitration proceeding, and (2) the district court lacked jurisdiction to grant an "arbitral antisuit injunction" under the principles of federalism and comity on the basis of 28 U.S.C. § 1257, the Anti-Injunction Act (28 U.S.C. § 2283) and the *Rooker-Feldman* doctrine.

On January 17, 2001, the district court denied Ms. Marello's Motion to Amend and Correct, finding that: (1) the district court had authority to enter its injunction under the All Writs Act (28 U.S.C. § 1651(a)) because the injunction was necessary to aid the court in its promotion of the federal policy favoring arbitration; and (2) the *Rooker-Feldman* doctrine was inapposite to the matter before the district court because CRL filed its Motion to Compel Arbitration in federal court before the state court rendered an opinion on the matter and, therefore, the district court's ruling could not be considered an impermissible appeal of the state court's ruling. The district court once again failed to address, however, the issue of costs and, in a footnote, summarily denied Ms. Marello's request for discovery on the costs, rules and remedies associated with the arbitral forum.

On February 8, 2001, Ms. Marello filed her timely Notice of Appeal in the United States Court of Appeals for the Third Circuit, arguing in part that the district court: (1) lacked jurisdiction under 28 U.S.C. § 1257 and the *Rooker-Feldman* doctrine to grant CRL's Petition to Compel Arbitration; (2) erred in refusing to abstain from exercising jurisdiction; (3) erred in granting CRL's Petition to Compel Arbitration because the $10,000 in filing fees and costs required by CRL's arbitration rules were so excessive they deprived Ms. Marello of due process of law under Pa. Const.Art. 1 & 11 and U.S. Const. Amend. XIV; and (4) erred when it refused to hold a hearing under Fed. R. Civ. P. 12(d) on the issue of whether the arbitration agreement was void for impossibility of performance because of the recission of the AAA Insurance Dispute Procedures and the excessive arbitration fees and expenses required by all of the arbitration agreements.

Shortly thereafter, CRL agreed to assume Marello's filing fees, but maintained that Ms. Marello would still be required to pay her own costs. On December 20, 2001, the Third Circuit affirmed the district court's order in a two paragraph unreported Memorandum Opinion.

On January 17, 2002, Ms. Marello filed her Sur Petition for Panel Rehearing and for En Banc Determination. Ms. Marello argued that the panel's decision was contrary to recent Supreme Court law, Third Circuit law, and decisions in the Fourth and Eight Circuit Courts, and that reconsideration was necessary to secure and maintain uniformity as to whether: (1) the costs of the arbitral forum were sufficiently prohibitive to prevent vindication of statutory rights; (2) a district court has jurisdiction to reverse a state court decision solely because a party files suit on the same issue in federal court based on diversity jurisdiction to hedge its bet against an adverse ruling pending in state court; and (3) the Federal Arbitration Act is inversely preempted by §2(b) of the McCarran-Ferguson Act (15 U.S.C.A. § 1012(b)).

On February 26, 2002, the Third Circuit denied Ms. Marello's Petition for a Panel Rehearing and for En Banc Determination.

REASONS FOR GRANTING THE WRIT

In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513, 522-23, 148 L.Ed.373 (2000), this Court found that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive and, therefore, substantively impair the prospective litigant from vindicating his or her statutory cause of action in the arbitral forum, that party bears the burden of showing the likelihood of incurring such costs. This Court left open, however, "how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence . . ." *Id.* 531 at 92, 121 S.Ct. at 523. Moreover, the Court did not have the opportunity to address whether, in the absence of a severance clause, courts should nevertheless compel arbitration and sever or rewrite the offending

arbitration provision or, declare the entire arbitration provision invalid and allow the litigants to proceed to court.

Petitioner's case provides the Court with the opportunity to provide concrete direction to those lower courts struggling with the method and sufficiency of proof necessary to establish whether the cost of arbitration is prohibitive enough to substantively impair the prospective litigant from vindicating his or her statutory cause of action in the arbitral forum. This case also provides the Court with the opportunity to resolve with finality the issue of whether courts should sever and/or rewrite the offending provision and compel arbitration, strike the provision in its entirety, or undertake a case-by-case analysis to determine the best course of action dependent upon the individual circumstances of the litigants.

I. HOW DETAILED A SHOWING MUST A CONSUMER MAKE THAT ARBITRATION IS COST PROHIBITIVE UNDER *GREEN TREE*?

This Court has long recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). As a result, the FAA has been broadly applied to statutory claims (*Mitsubishi*, 473 U.S. at 626-27; *Gilmer*, 500 U.S. at 26) (1991) and to disputes arising from consumer transactions. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). The Court has consistently been careful, however, to ensure that arbitration continues to serve the FAA's dual goals of allowing for faster and cheaper resolution procedures, while preserving all of a party's legal remedies. See, e.g., *Mitsubishi*, 473 U.S. at 628.

Consistent with this line of jurisprudence, the Court recently found in *Green Tree* that the existence of large arbitration costs could preclude a litigant from effectively vindicating his or her federal statutory rights in the arbitral

forum. *Green Tree*, 531 at 90, 121 S.Ct. at 522. The Court placed the burden on the party seeking to avoid arbitration, however, to demonstrate "the likelihood of incurring such costs." *Id.*, 531 at 92, 121 S.Ct. at 522. What remains unclear after *Green Tree* is: (1) exactly how high costs must be to invalidate an arbitration agreement; (2) whether the decision of prohibitive cost is objective or subjective; and (3) whether the rationale of *Green Tree* applies to situations other than the assertion of federal statutory rights, such as state consumer rights laws. See Alderman, Richard, *Pre-dispute Mandatory Arbitration In Consumer Contracts: A Call For Reform*, 38 Hou. L. Rev. 1237, 1253 (2001).

In addition, the cases following *Green Tree* not only reveal a lack of consistency in the level of burden placed upon parties seeking to avoid arbitration, they have also frequently included open questioning on how best to remedy offending provisions in the absence of a severance clause. In short, until the Court clarifies precisely what constitutes excessive costs and how an arbitration agreement imposing them should be handled, the continued high cost of arbitration in consumer contracts will preclude consumers from making claims against companies in court or the arbitral forum, thereby resulting in an industry imposed surreptitious "tort-reform" that effectively eliminates legislative remedies specifically designed to protect consumers.

A number of lower courts have appeared to apply *Green Tree* in conjunction with the "national policy favoring arbitration" (E.g., *Mastrobuono v. Sherson Lehman Hutton, Inc.*, 514 U.s. 52, 56, 115 S.Ct. 1212, 1215, 131 L.Ed. 2d 76 (1995)) to enforce all arbitration provisions unless the party opposing arbitration provides clear and convincing evidence that they will "certainly" incur prohibitive costs. Goals favoring arbitration of civil disputes, however, should not be used as an impediment to block a consumers' access to justice. See *Mendez v. Palm Harbor Homes, Inc.*, No. 20317-4-III, __ P.3d __, 2002 WL 826409 (Wash. App. Div. 3 2002)(relying on *Green Tree* and recent federal case law to find in a matter of first impression that an arbitration agreement may be stricken when the party opposing arbitration reasonably shows in law or equity that prohibitive

costs are likely to render the arbitral forum inaccessible). Moreover, nothing in *Green Tree* suggests that consumers should be saddled with such an oppressive burden.

For example, during oral arguments in *Green Tree*, the following colloquy took place between Chief Justice Rehnquist and the Petitioner's counsel.

> QUESTION: Mr. Phillips, suppose that, unlike the case here, the person objecting to arbitration had made a significant showing in the District Court, not going to arbitration but saying, look, here are some figures from past arbitrations; we think this is going to be just like this one; the party who wanted to go to arbitration doesn't contradict that; the District Court says yes, these kinds of costs are going to be incurred in the arbitration, and therefore it's unconscionable. I don't see why - - that party should have to go to arbitration if they can make a persuasive showing to the Court.
>
> MR. PHILLIPS: I don't disagree with that, Mr. Chief Justice. I think that you have either of two ways to try and prove up your case, either through discovery, which he had a full and fair opportunity to do, and didn't present any evidence with respect to that or, assuming that there's going to be doubts - - and I think all doubts, again, ought to be resolved in favor of pushing towards arbitration in order to ascertain this.
>
> * * *
>
> QUESTION: But supposing the arbitration, say, goes on for a week, and the arbitrators' time is consumed, and the plaintiff's, and the defendant's, and then it turns out that a court is going to find the arrangements were unconscionable, that the plaintiff was required

> to put up thousands of dollars, or the party objecting, and so you've basically spun your wheels in the arbitration proceeding.
>
> MR. PHILLIPS: Well, hopefully that wouldn't happen, obviously, and you wouldn't expect it to happen very often, but again I don't disagree with you, Mr. Chief Justice.

See *Green Tree Financial Corporation v. Randolph*, No. 99-1235, United States Supreme Court Official Transcript (October 3, 2000); 2000 WL 1513141 at *19-20.

Based on the preceding exchange, one would conclude that the evidence presented by Ms. Marello should have been sufficient to meet her burden of demonstrating that arbitration was cost prohibitive. The record reflects that Marello (1) submitted deposition evidence revealing that she was an unemployed high school educated waitress on social security as a result of a chronic illness; (2) provided the court with evidence of the actual $5,290 in costs another consumer had previously incurred as a result of partially arbitrating an identical issue (i.e., denial of same benefit) with CRL; and (3) listed the actual fees and costs that would likely be incurred as a result of arbitrating a claim under each of the arbitration procedures in dispute. Notwithstanding this undisputed evidence, the district court not only failed to find the costs prohibitive, it also denied Marello's request for discovery to further support her claims, and the Third Circuit upheld the district court's decision.

The Third Circuit's decision is particularly troubling and has far reaching consequences under the present circumstances because the arbitration provision in dispute is included in a health insurance policy, and the minimum nonrefundable filing fee of $1,000 far exceeds the majority of the treatment costs incurred by the majority of the individuals insured under that policy. CRL's arbitration provisions essentially guarantee, therefore, that the overwhelming majority of coverage disputes will never be arbitrated or litigated unless a substantial amount of money is

at stake as a result of a major medical expense. These procedures are clearly contrary to the Consumer-Related Dispute Procedures AAA adopted in 1999, which allow a maximum of $125 to be borne by the consumer, and requires the balance to be borne by the company in smaller claims. See *Green Tree Financial Corporation v. Randolph*, Brief Amicus Curiae Of The American Arbitration Association, 2000 WL 744161at Appendix B. CRL's procedures are also directly at odds with the "Due Process Protocol For Resolution Of Health Care Disputes" that entirely precludes pre-dispute arbitration clauses, and which have now been adopted not only by the AAA, but the American Bar Association and the American Medical Association. See www.adr.org.

More importantly for the purposes of this Petition, a number of courts have interpreted *Green Tree* as if it placed an ambiguous, but onerous, burden on the party seeking to avoid arbitration, which is entirely at odds with this Court's concern of "access" to the arbitral forum. See *Green Tree*, 531 U.S. at 93, 121 S.Ct. at 523 (Justice Ginsberg, concurring and dissenting in part)(identifying two discrete inquiries relating to the "adequacy" and "accessibility" of the arbitral forum). For example, in *Boyd v. The Town of Hayneville, Alabama*, 144 F.Supp.2d 1272, 1280 (M.D. Ala. 2001), the plaintiff submitted (1) uncontested evidence (the town did not even respond) that demonstrated he would incur a $500 filing fee and be required to pay between $1,150 and $6,400 toward the arbitrator's compensation, and (2) personal financial information that revealed that plaintiff and his wife supported their three children on $2,078 per month, and that their average monthly bills were $1,951 per month. *Id.* at 1277. Although the court recognized that, given Plaintiff's financial situation, the costs of either litigating or arbitrating his claims could place him and his family in a precarious position, it nevertheless found that the risk of prohibitive arbitration costs were too speculative to require invalidation of arbitration agreement because: (1) the plaintiff only provided anticipated arbitration costs, (2) his financial information would presumably be factored into an assessment of costs under AAA's hardship provision, and (3)

the plaintiff provided no evidence of comparable expense of litigation. *Id.* at 1280.

In the frequently cited post *Green Tree* case of *Dabney v. Option One Mortgage Corporation*, No. 00-5831, 2001 WL 410543, at *3 (E.D. Pa. 2001), another Eastern District of Pennsylvania decision, the plaintiff also submitted uncontested evidence of the administrative fees and arbitrator's compensation bills she would incur under the AAA rules, and argued, without objection, that she had no savings or other means to pay such fees. Despite the uncontested evidence, the court found that the risk of plaintiff bearing such costs "was speculative" because the AAA rules provided that filing and administrative fees "may be" reduced in cases of extreme hardship and are subject to final apportionment by the arbitrator *Id.* at *4. The court further reasoned that to the extent that Plaintiff had to pay her own attorney's fees and litigation expenses, such burden is borne by any litigant in federal court as well. *Id.*

Dabney's findings are particularly noteworthy, however, because the court failed to explain why the likelihood of an equitable final apportionment by the arbitrator would somehow be less speculative than the risk of the Plaintiff being saddled with the fees and costs that the Plaintiff had already proven were her responsibility, unless or until an arbitrator relieved the obligation. In addition, the court's unqualified reference to comparable litigation expenses fails to note that litigants typically do not have to pay the judge for his or her time and travel, or pay rent for the court room and/or a court reporter. Cf. *Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 897 (W.D. Va. 2001)(finding that even if exorbitant filing fees were waived, plaintiff could still not afford her share of the arbitration costs); *Phillips v. Associates Home Equity*, No. 01-944, 2001 WL 1159216 at *4-5 (N.D. Ill. Sept. 28, 2001)(finding that it "is nothing more than an argument that there exists some *possibility* that Phillips ultimately may not have to bear a prohibitively expensive portion of the arbitration costs")

Notwithstanding, a significant number of lower courts have adopted a similar onerous threshold of proof and found that the "possibility" of being relieved of the fees and costs

associated with arbitration essentially prevents a party from establishing prohibitive costs. See *Klinedinst v. Tiger Dry Lac U.S.A., Inc.*, 2001 WL 151821, * 14 (D.N.H. 2001)(denying prohibitive cost argument due to existence of fee shifting provision, reasoning that employee could always move in federal court to vacate the award at the conclusion of arbitration under 9 U.S.C. ¶ 10, if he believes that costs and fees have been allocated in manifest disregard of the law); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir.1999) (refusing to invalidate arbitration scheme simply because of the possibility that the arbitrator would charge the plaintiff a forum fee "which may be as high as $3,000 per day and tens of thousands of dollars per case," because, among other reasons, "arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court," and employees generally did not bear forum fees because the "arbitrators possess[ed] discretion to award costs and fees when they decide a dispute."); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir.1999) (same; finding that former employee was Director in a securities trading department, and the arbitration clause allowed for shifting forum fees), *cert. denied*, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (Oct. 4, 1999); *Arakawa v. Japan Network Group*, 56 F.Supp.2d 349, 354-55 (S.D.N.Y.1999) (same); *Sydnor v. Conseco Financial Corp*, 252 F.3d 302 (4th Cir. 2001)(relying on *Green Tree* and finding that borrower presented little evidence from which the district court could have concluded that arbitration was prohibitively expensive, and appellant had also represented its willingness to pay arbitration fees arising from the dispute); *Manuel v. Honda RND America's, Inc.*, 175 F.Supp.2d 987 (S.D. Oh. 2001)(finding that although former employee "faces the potential of being saddled with a substantial portion of the costs of arbitration (e.g., all of the fees and costs of the arbitrator and the costs of any record or transcript of the arbitration, in addition to his own attorneys' fees, witness fees, and other costs of preparing his case) should he ultimately lose in that forum, there is no indication of the potential total cost. In addition, neither party has provided the court with the anticipated costs of litigating this

matter, as opposed to arbitrating it, for the court to use as a comparison").

Not all courts of course, have taken such a draconian view on the how to apply the *Green Tree* burden. Some courts have adopted a more realistic posture about the sufficiency of evidence required to demonstrate an arbitration proceeding's cost prohibitiveness. See *Spinetti v. Service Corp. Intern.*, No. 01-1191, 2001 WL 1781921, 87 Fair Empl.Prac.Cas. (BNA) 1707 (W.D.Pa. Nov 15, 2001)(finding that it hardly seems likely that a person living off credit card advances could afford to pay the costs associated with arbitration, which included a $2,000 filing fee, plus one-half of the costs relating to the administration of the arbitration proceeding); *Ball v. SFX Broadcasting, Inc.* , No. 00-1090, 2001 WL 1048556 at *7, 165 F.Supp.2d 230, 86 FEP Cases 991 (N.D.N.Y. Aug. 21, 2001) (finding that plaintiff had proven she could not pay arbitration fees where she would be charged a $1,000 per day arbitrator's fee, a $500 counterclaim fee and a $150 a day hearing fee, in light of the fact that she was newly employed on a commission basis and was the sole financial support for herself and children); *Phillips v. Associates Home Equity*, No. 01-944, 2001 WL 1159216 at *4-5 (N.D. Ill. Sept. 28, 2001) (holding that plaintiff had met her burden of "showing that the expense of arbitration would be prohibitive" where she would be forced to pay upwards of $4,000 to file her claim); *Camacho v. Holiday Homes, Inc.*,167 F.Supp.2d 892 (W.D. Va. 2001) (finding that plaintiff satisfied her burden of proof under *Green Tree* where she made approximately $300 per week, provided sole support for herself and three children, had $14,125 debt in student loans and paid several hundred dollars a month in living expenses and, where the costs of arbitration would range between $1,200 and $8,000); *Ting v. AT & T*, 182 F.Supp.2d 902, 933-35 (N.D.Cal.2002) (finding AT&T's arbitration provisions unconscionable because they placed prohibitive costs on complaining customers attempting to vindicate their claims; noting that "a class member's potential cost before arbitration begins would be $5800," as compared to "[f]iling that suit in a court, which she supports with her taxes, would generally cost her under $200 in California); and *Giordano v.*

Pep Boys--Manny, Moe & Jack, No. 99-1281, 2001 WL 484360 (E.D. Pa. March 29, 2001) (declaring an arbitration agreement unenforceable where plaintiff made $400 per week and faced arbitration costs which would likely consist of a $2,000 filing fee and a daily arbitrator fee of between $600 and $900 – reasoning that nothing in *Green Tree* requires courts to undertake a detailed analysis of the household budgets of low-level employees to conclude arbitration costs in the thousands of dollars deter the vindication of employee's claims in arbitral forum).

What these cases make clear is that different courts place varying burdens upon parties opposing arbitration due to prohibitive costs dependent primarily upon whether they subscribe to the theory that when there is a "possibility" that the arbitrator "could" reduce fees and costs, a party cannot establish the "likelihood" of cost prohibitiveness. This Court thus could substantially reduce the number of petitions to compel arbitration being filed in both state and federal courts by addressing this issue alone. Cf. *Mendez*, 2002 WL 826409 at *13 (finding it unreasonable to require party to actually incur costs in order to met his burden of proof based on the mere speculation that the arbitrator could use the fee shifting provision because when taken to its logical conclusion, it would always render the costs or arbitration irrelevant whenever fee shifting is a possibility, even in the case of an indigent plaintiff).

II. MAY A COURT PRECLUDE A CONSUMER FROM USING JUDICIAL DISCOVERY TO COLLECT INFORMATION NECESSARY TO MEET THE CONSUMER'S *GREEN TREE* BURDEN?

In the present case Marello not only requested an evidentiary hearing, she also submitted proposed limited discovery with the court aimed at resolving a dispute as to which rules would be applied to her arbitration proceeding (and what costs and remedies would be applicable), so that she could meet the burden of demonstrating whether the arbitral forum would effectively vindicate her statutory

rights. The district court denied her requests and the Third Circuit affirmed that denial. Less than one month after denying Marello's Petition for a Panel Rehearing or an En Banc Determination, however, the Third Circuit inexplicably issued *Blair v. Scott Specialty Gases*, 283 F.3d 595, 608-09 (3rd Cir. 2002), and found that although discovery ordinarily is not undertaken at such an early stage of the proceeding that is governed by an arbitration agreement, "*Green Tree* had established the right of a claimant to invoke discovery procedures in a pre-arbitration proceeding in order to assist the claimant in meeting her burden of showing the likelihood of bearing prohibitive costs." See also *Livingston and Associates Financing, Inc.* 2001 WL 709465 at *2 (N.D. Ill. June 25, 2001)(holding that the only way a claimant can uncover reasonably sufficient facts required by *Green Tree* is through limited discovery since it seems axiomatic that if the Supreme Court places a burden on a party then that party must be given an opportunity to pursue discovery); *Spinetti, 2001 WL 1781921, at FN 2 (W.D. Pa. 2001), 87 FEP Cases 1707 (*reading *Green Tree* as implicitly granting a district court authority to engage a preliminary inquiry regarding the alleged prohibitive costs associated with arbitration prior to compelling arbitration because otherwise, "a district court cannot correct the imposition of costs on an appeal from arbitration where the costs of arbitration were so prohibitive as to persuade the claimant from asserting her federal statutory right"); But see *Giordano*, 2001 WL 484360, at *6 (E.D. Pa 2001)(declining plaintiff's request that court remain involved in the discovery phase of arbitration, asserting plaintiff did not make a showing that arbitration's discovery procedures will prove insufficient).

In short, although *Green Tree* clearly implied that judicial discovery would be available to a party opposing arbitration so that he or she could demonstrate whether the arbitral forum in question allowed the party to effectively vindicate his or her statutory rights, *Green Tree* did not address whether discovery would be limited to "accessibility" arguments such as cost prohibitiveness, or include "adequacy" arguments such as availability of procedures and remedies as well. This case affords this Court an opportunity

to address and resolve this issue, thereby reducing or eliminating future litigation on the availability and scope of discovery prior to arbitration.

III. IN THE ABSENCE OF A SEVERANCE CLAUSE, SHOULD COURTS SEVER OR REWRITE OFFENDING ARBITRAL PROVISIONS, STRIKE THE PROVISION IN ITS ENTIRETY, OR DECIDE ON A CASE-BY-CASE BASIS HOW BEST TO REMEDY THE PROVISION DEPENDENT UPON THE CIRCUMSTANCES OF THE LITIGANTS?

There is little consensus among the lower courts regarding how best to remedy an invalid arbitration provision. The majority of the courts, however, have appeared to adopt the premise that courts should sever or rewrite the offending provision and compel arbitration. E.g., *Gannon v. Circuit City Stores, Inc.* , 262 F.3d 677, 680-81, 86 FEP Cases 755 (8th Cir. 2001) (finding invalid provision limiting punitive damages could be severed from arbitration agreement, but additionally finding that agreement expressed parties' unambiguous intent to sever any invalid terms); *Giordano*, 2001 WL 484360 at *6 (compelling arbitration after noting existence of explicit severance clause and plaintiff's willingness to proceed to arbitration); *Zumpano v. Omnipoint Communications*, Civ. No. 00-595, 2001 WL 43781 at *12, 84 FEP Cases 1592 (E.D. Pa. Jan. 18, 2001) (stating, in dicta, that the court would nullify any offensive portion of the arbitration agreement and compel arbitration); *Quinn v. EMC Corp.*,109 F.Supp.2d 681, 685-86, 83 FEP Cases 1089 (S.D. Tex. 2000) (reasoning, in dicta, that "even if the Court were convinced that Plaintiff cannot afford to pay for the arbitration proceeding, the better solution would be to nullify the fee provisions of the arbitration agreement and have [the Defendant] shoulder the expense. Plaintiff's proposed solution of abrogation of the entire arbitration agreement is unnecessarily radical"); *Spinetti*, 2001 WL 1781921 (W.D. Pa. 2001)(finding that the unenforceable provisions of the arbitration agreement requiring claimant to

pay arbitration costs and barring her from obtaining award of attorneys' fees if she prevails will be severed from arbitration agreement, and remainder of agreement will be enforced, even though agreement does not contain severability clause).

While these decisions are admittedly consistent with the strong federal policy favoring enforcement of arbitration agreements, the existence of such a default rule does a great injustice to consumers and employees because it encourages companies to include as many oppressive conditions as possible, comfortable in the knowledge that the worse case scenario will still result in arbitration. E.g., *Hooters of American, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (finding that Hooters promulgated "so many biased rules" that it created "a sham system unworthy even of the name of arbitration." In an attempt to avoid such an inequitable result, some courts have taken the middle road when addressing the issue of exorbitant costs by agreeing to reconsider their decision denying petitioner's motion to compel if the company subsequently agreed to bear the fees and costs of arbitration. E.g., *Phillips*, 179 F.Supp.2d at 847 ("In the event . . . defendants were to agree to bear the costs associated with the arbitration, the Court would be willing to entertain a motion to reconsider its ruling on that basis"); *Camacho*, 167 F.Supp.2d at 987 (same).

Other Courts, however, have held that the entire agreement is unenforceable. For example, in *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1286-87 86 FEP Cases 613 (11th Cir. 2001), the Eleventh Circuit court noted that in the absence of severability provision, "the policy favoring arbitration agreements does not require that courts sever unlawful positions, rather than void the agreement." The court then voided the entire agreement, reasoning that:

> if an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an unknowledgeable employee from initiating arbitration, even if

> they would ultimately not be enforced. It would also add an expensive procedural step to prosecuting a claim; the employee would have to request a court to declare a provision unlawful and sever it before initiating arbitration. Including an unlawful provision would cost the employer little, particularly where, as here, the arbitration agreement provides the employee must bear the employer's court costs and attorneys' fees incurred defending the agreement if arbitration is challenged and the employer prevails. *Id.*

See also Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1249 (9th Cir. 1994)(finding arbitration clause employed by franchisor in distributor agreement severable because it violated Petroleum Marketing Act by compelling franchisee to surrender important statutorily mandated rights, but ultimately deciding the entire arbitration clause, rather than merely portions that violated Act, would be severed from remainder of contract). In short, this Court has instructed that the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr., Univ.*, 489 U.S. 468, 479 (1989). If a private agreement to arbitrate cannot be enforced according to its terms, the courts should refuse to enforce it. They should not draft and enforce a new "agreement" to arbitrate of their own making. Where a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a legal way for the drafter to enjoy the otherwise-unobtainable results it sought.

As previously mentioned, the present case involves a health insurance policy where the minimum nonrefundable filing fee of $1,000 far exceeds the majority of the treatment costs incurred by the majority of the individuals insured under CRL's policy. CRL's arbitration provisions essentially guarantee, therefore, that the overwhelming majority of

coverage disputes will never be arbitrated or litigated unless a substantial amount of money is at stake as a result of a major medical expense, or an insured takes CRL to court to have the procedures declared cost prohibitive. Rewriting the contract and compelling arbitration simply makes a court an accomplice to CRL's efforts to minimize consumers' access to justice.

In summary, this case perfectly illustrates how an industry will frequently deploy measures that effectively conceal arbitration clauses from consumers by neglecting to provide any explanations about arbitration, locating arbitration clauses in fine print or embedded within large documents, or adding them to contracts using mailing stuffers and change-in-terms clauses. Regrettably, courts will all too often summarily enforce arbitration clauses where consumers had little or no notice that they had even waived their fundamental right to use the judicial system, all in the name of following the federal policy favoring arbitration. As a consequence, the FAA, which once served to protect parties who entered into contracts, is today being used to harm consumers who have significantly less resources and knowledge than the companies with which they enter into agreements. Until companies are prevented from using mandatory arbitration clauses in adhesion contracts with costly participation fees, consumers' fundamental rights to the judicial system will be trampled on, companies will be able to avoid setting unfavorable precedent in court, and consumer protection laws will be superfluous.

IV. SHOULD THE DISTRICT COURT HAVE ENTERED JUDGMENT ORDERING THE CONSUMER TO ARBITRATE HER STATUTORY CLAIM AFTER THE STATE COURT HAD DENIED THE INSURANCE COMPANY'S REQUEST TO COMPEL ARBITRATION?

The State of Pennsylvania has long had a public policy that favors arbitration. *Langston v. National Medical Corp.*, 420 Pa. Super. 611, 615-16, 617 A.2d 354, 356 (1992) (holding

that Pennsylvania's courts favor resolution of disputes through arbitration). The Supreme Court of Pennsylvania has held that Pennsylvania's Uniform Arbitration Act expresses a strong public policy in favor of arbitration, and the court looks to federal common and statutory law to interpret the Act. *Flightways Corp. v. Keystone Helicopter*, 331 A.2d 184, 459 Pa. 660 (1975).

In the present case, CRL filed a petition to compel arbitration against Marello in federal court in direct response to Ms. Marello's state court suit because it could not remove the case due to Nissly's (a Pennsylvania resident) participation. CRL then simultaneously litigated its attempt to compel arbitration in both the state and federal court. Although the district court had been informed that the state court had already denied CRL's preliminary objections seeking to compel arbitration, the district court, faced with the same facts as the state court, entered its order compelling arbitration. Should the district court have usurped the state court's jurisdiction and essentially allowED CRL to take two bites at the apple?

Nothing in the language or legislative history of the FAA suggests that Congress intended to grant federal courts exclusive or preemptory jurisdiction to enforce arbitration agreements. Moreover, the legislative history of the FAA clearly establishes that the Act was passed to supplement, not supplant, an ongoing effort to modernize state law. Jean R. Sternlight, *Forum Shopping For Arbitration Decisions: Federal Courts' Use Of Antisuit Injunctions Against State Courts*, 47 U. Pa. L. Rev. 91, 116, n. 104. Succinctly stated, although Sections 3 and 4 (9 U.S.C. §§ 3, 4 (1994)) of the FAA allow a federal court to stay litigation brought before it and to compel arbitration, the FAA does not contain any express pre-emptive provision, nor does it reflect a congressional intention to occupy the entire field of arbitration. *Olde Discount Corporation v. Tupman*, 1 F.3d 202, 215 (3d Cir. 1993) quoting *Volt Info. Sciences Inc. v. Stanford University*, 489 U.S. 468, 477 (1989).

The doctrine of comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers,

and already cognizant of the litigation, have had an opportunity to pass upon the matter." Lambert v. Blackwell, 134 F.3d 506, 513 n. 18 (3rd Cir. 1997), *citing* Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed.2d 379 (1982). The exercise of circumspect deference, and perhaps even respect, toward the state tribunal was appropriate under the circumstances of this case. The district court's decision has created a blue print for insurance industries nationwide on how to minimize the likelihood of an adverse decision on a petition to compel arbitration by initiating federal litigation before filing a response in state court. This Court must decide whether to allow or deny that practice. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413(1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

CONCLUSION

This petition for writ of *certiorari* should be granted.

Respectfully submitted,

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Attorney for Petitioner

(Any footnotes trail end of each document)

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1339

CENTRAL RESERVE LIFE INSURANCE COMPANY,

v.

DOROTHY A. MARELLO
Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 00-cv-3344

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 18, 2001
Before Sloviter and McKee, Circuit Judges and Hayden,
District Judge*

(Filed December 20, 2001)

MEMORANDUM OPINION

McKee, Circuit Judge.

Dorothy A. Marello appeals the order of the United States District Court for the Eastern District of Pennsylvania granting Central Reserve Life Insurance Company's Petition to Compel Arbitration under the Federal Arbitration Act and the denial of her motion to correct the order compelling arbitration.

Inasmuch as we write only for the parties, we need not present the factual or procedural background of this

appeal. We have reviewed the thoughtful Memorandum Opinions of the district court and we will affirm substantially for the reasons set forth in those opinions.

TO THE CLERK:

Please file the foregoing memorandum opinion.

By the Court
Circuit Judge

Footnotes

*The Honorable Katharine S. Hayden, United States District Court of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO.01-1339

CENTRAL RESERVE LIFE INSURANCE COMPANY,

v.

DOROTHY A. MARELLO
Appellant

SUR PETITION FOR PANEL REHEARING
AND FOR EN BANC DETERMINATION

BEFORE: BECKER, SLOVITER, MANSMANN SCIRICA,
NYGAARD
ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO,
FUENTES Circuit Judges and
HAYDEN*, District Judge

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for panel rehearing and for en banc determination is hereby DENIED.

IT IS SO ORDERED.

By the Court.

Hon. Theodore A. McKee
Circuit Judge

DATED: February 26, 2002

Footnotes

*Hon. Katharine S. Hayden, United States District Judge for the District of New Jersey, sat by designation.

UNITED STATES COURT OF APPEALS
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December 18, 2001
Before Sloviter and McKee, Circuit Judges and Hayden,
District Judge[1]

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on December 18, 2001.

And now, having considered the arguments of the parties, the orders of the district court of the Eastern District of Pennsylvania dated October 3, 2000 and January 17, 2001 are hereby affirmed. All of the above in accordance with the opinion of this Court. Costs taxed against appellant.

DATED December20, 2001

ATTEST:
ACTING CLERK

Certified as a true copy and issued in lieu of a formal mandate on March 6, 2002

Teste:

Clerk, United States Court of Appeals for the Third Circuit

Footnotes

1The Honorable Katharine S. Hayden, United States District Court of New Jersey, sitting by designation.

CIVIL ACTION 00-3344

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRAL RESERVE LIFE INSURANCE COMPANY

v.

DOROTHY A. MARELLO

October 3, 2000, Decided

October 4, 2000, Filed

COUNSEL:
For CENTRAL RESERVE LIFE INSURANCE COMPANY, PLAINTIFF: GEORGE C. WERNER, JR., BARLEY, SNYDER, SENFT & COHEN, LANCASTER, PA USA.

For DOROTHY A. MARELLO, DEFENDANT: ERIC L. KEEPERS, RODA AND NAST, P.C., LANCASTER, PA USA. JAMES G. FAHEY, THOMAS H. WILSON, SORLING NORTHRUP HANNA, ET AL, SPRINGFIELD, IL USA. R. GERALD BARRIS, SORLING NORTHRUP HANNA, ET AL, SPRINGFIELD, IL USA.

JUDGES:
JAMES McGIRR KELLY, J.

OPINIONBY:
JAMES McGIRR KELLY

OPINION:

MEMORANDUM AND ORDER

J. M. KELLY, J.

October 3, 2000

Presently before the Court is a Motion to Compel Arbitration and Stay Court Proceedings filed by the Plaintiff, Central Reserve Life Insurance Company ("Central Reserve"). The Defendant, Dorothy A. Marello ("Marello"), has health insurance coverage provided by Central Reserve. Marello sought medical treatment that Central Reserve refused to cover. Marello subsequently filed suit in state court to compel Central Reserve to cover the cost of her treatment. Central Reserve filed suit in this Court to compel Marello to arbitrate her claims pursuant to an arbitration clause contained in her insurance policy. For the following reasons, Central Reserve's motion is granted.

I. BACKGROUND

Central Reserve, an Ohio corporation registered to transact business in Pennsylvania, sells medical insurance policies to individuals and small groups. Central Reserve issued an individual preferred provider medical indemnification policy ("Insurance Policy") to Marello, a Pennsylvania citizen who resides in Lancaster, Pennsylvania. Marello filled out an application for insurance that stated, directly above her signature, that "any disputes arising under the Policy are subject to an appeals procedure, including arbitration, which may be binding, depending on state law." The Insurance Policy issued to Marello contained an arbitration provision that reads:

> After exhaustion of the Appeal of Decision procedures, any dispute arising out of or related to the Policy that remains shall be settled by arbitration in accordance with applicable federal or state laws and the Insurance Dispute Resolution Procedures, as amended, and administered by the American Arbitration Association . . . .

Marello signed the Insurance Policy below the arbitration clause. Marello asserts, however, that Central Reserve neither told her to read the clause nor instructed her as to its effect.

In April of 1999, Marello was diagnosed with primary amyloidosis. Marello underwent chemotherapy, which Central Reserve covered. Marello then sought treatment at the Mayo Clinic in Rochester, Minnesota. In December, 1999, Marello's doctors proposed treating her with high dose chemotherapy with peripheral stem cell rescue. Central Reserve considered this treatment experimental and notified Marello that the Insurance Policy did not cover it.

Marello disagreed with Central Reserve and proceeded through an administrative appeal process. Despite the arbitration clause in her Insurance Policy, Marello filed a complaint in the Court of Common Pleas of Lancaster County, Pennsylvania.[1] Marello sought an injunction ordering Central Reserve to pay for her proposed medical treatment and also alleged, among other things, fraud and bad faith. Pursuant to the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1* et seq. (1994), Central Reserve now seeks to compel arbitration of Marello's claims.

II. STANDARD OF REVIEW

When ruling on a motion to compel arbitration under the FAA, a court may not consider the merits of the underlying claims. Rather, the court may only determine whether the merits of the case should be arbitrated or litigated. *Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 228 (3d Cir. 1997)*. Before compelling arbitration, a district court must first determine whether: (1) the parties entered into a valid arbitration agreement; and (2) the dispute between the parties falls within the language of the arbitration agreement. Id.; *John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998)*. An arbitration agreement is not binding, and thus a court cannot compel arbitration, if the agreement is based on fraud, duress, mistake, or some other ground recognized in general contract law. *Smith v. The Equitable, 209 F.3d 268, 270 (3d Cir. 2000)*.

III. DISCUSSION

The FAA provides that, so long as an independent basis of federal jurisdiction exists,[2] a party to a contract may petition the federal courts for an order compelling arbitration if the

other party breaches an arbitration clause. *9 U.S.C. § 4.* Filing a lawsuit based on arbitrable claims constitutes such a breach. Under the FAA, so long as there is a way to interpret the arbitration clause so as to cover the disputed issue, courts should compel arbitration. *Smith v. The Equitable, 27 F. Supp. 2d 565, 568 (E.D. Pa. 1998).* Moreover, when determining the breadth of an arbitration clause, courts should resolve any ambiguity in the clause in favor of the party seeking arbitration. Id.

In the instant case, Marello signed a valid agreement for health insurance. The Insurance Policy contained an arbitration clause that is apparent when reading the document. That arbitration clause clearly encompasses the matters Marello sought to litigate in state court. Therefore, the Court can compel arbitration of the current dispute pursuant to the FAA.

Marello posits several reasons that the Court should elect not to compel arbitration in this. None of these reasons is persuasive. First, the Court should not abstain from ruling on this matter. Marello cites four United States Supreme Court cases that advanced different justifications for federal courts to abstain from exercising their jurisdiction over otherwise justiciable cases: *Railroad Commission v. Pullman, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); Colorado River Water Conservation District v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).* The instant case, however, implicates none of these doctrines. Abstention pursuant to Pullman, which allows federal courts to abstain if allowing the state court to resolve the claim will make deciding a constitutional claim unnecessary, is inappropriate because the instant case presents no true question of constitutional law. Abstention pursuant to Buford is uncalled for because the instant case neither presents difficult questions of state law nor inappropriately disrupts state efforts to develop consistent public policy. Abstention under Younger is improper because refusing to compel arbitration would nullify Central Reserve's federal statutory rights under the FAA. See *Olde Discount*

Corp. v. Tupman, 1 F.3d 202, 213 (3d Cir. 1993). Abstention pursuant to Colorado River, which allows abstention in order to avoid piecemeal litigation, is also inappropriate because the FAA prefers piecemeal litigation to ineffective arbitration clauses. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).* Because Marello has not met the heavy burden imposed on parties seeking federal judicial abstention, the Court will not abstain from ruling on the motion to compel arbitration.

Second, the Court will not dismiss Central Reserve's motion on grounds of impossibility. Marello contends that complying with the arbitration clause is impossible because the AAA has abandoned the arbitration procedures set forth in the contract. To the contrary, the Insurance Dispute Resolution Procedures referred to in the Insurance Policy remain in effect. See Plf.'s Reply Mem. of Law at 2-3. Therefore, complying with them is clearly possible.

Third, the Court will not deny Central Reserve's motion merely because Marello has alleged fraud in her state court Complaint. The alleged fraud is a matter arising from the Insurance Policy and, as such, should be resolved by an arbitrator rather than this Court. Of course, an arbitration clause may be invalid, and thus unenforceable by a motion to compel arbitration, if it was procured through fraud. *Smith v. The Equitable, 209 F.3d 268, 270 (3d Cir. 2000).* A party can only avoid an arbitration clause, however, if she specifically alleges that the arbitration clause itself was the product of fraudulent inducement. *Prima Paint Corp. v. Flood & Franklin Mfg. Co., 388 U.S. 395, 403-04, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1367 (D.N.J. 1989).* Although Marello's response to the Central Reserve's Motion to Compel Arbitration contends otherwise, Marello's Complaint never specifically alleges that Central Reserve fraudulently induced Marello to agree to the arbitration clause. See Complaint PP 78-81, 89-92. That Central Reserve may not have highlighted the language in the contract, which Marello signed, neither amounts to fraud nor justifies avoiding the arbitration clause. Marello signed the

contract and is charged with having read it. See *Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903 n.7 (3d Cir. 1997); Audio Video Center, Inc. v. First Union Nat'l Bank, 84 F. Supp. 2d 624, 627 (E.D. Pa. 2000);* see also *Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (Pa. 1983).*

Fourth, the arbitration clause does not violate Marello's constitutional rights to due process. Marello's claims of fraud and bad faith arise out of the Insurance Policy and are arbitrable under Pennsylvania law. *Shadduck v. Christopher J. Kalick, Inc., 713 A.2d 635, 638-39 (Pa. Super. 1998).*[3]

Fifth, the state court's dismissal of Central Reserve's preliminary objections has no preclusive effect on this matter. In Marello's state court action, the judge dismissed Central Reserve's preliminary objections, which had requested that the court dismiss the Complaint pending the outcome of arbitration. Marello believes that the court's dismissal amounts to a finding that arbitration is not appropriate and that, consequently, this Court must bow to that resolution. Federal courts must only give preclusive effect to forum state court decisions, however, if a court in that forum state would do the same. *Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451, 461 (3d Cir. 1996).* Under Pennsylvania law, a state court's holding does not have either claim or issue preclusive effect until the issues in the first action have been fully litigated and adjudged. Id.; *Bortz v. W.C.A.B., 546 Pa. 77, 683 A.2d 259, 261 (1996).* Claim or issue preclusion is inappropriate unless, among other things, the ruling was valid, final and on the merits. Judge Stengel's dismissal of Central Reserve's preliminary objections are not considered final under Pennsylvania law unless all claims raised in the underlying action are dismissed. *Continental Bank v. Andrew Building Co., 436 Pa. Super. 559, 648 A.2d 551, 554 (1994).* Because the state court's ruling in this matter is not final, it has no preclusive effect on this Court. Nothing precludes the Court from ruling on this matter.

Finally, Marello seeks leave to conduct discovery regarding the arbitration clause. As this matter should be arbitrated, this Court's ordering or allowing discovery

regarding the arbitration clause is inappropriate. Discovery may, of course, be conducted pursuant to the applicable procedures set forth during arbitration.

In summary, this matter should proceed to arbitration with all possible speed. The Court does not hold that Marello's claims lack merit. The Court holds only that, for the time being, that decision belongs to a neutral arbitrator. Accordingly, Central Reserve's Motion to Compel Arbitration is granted and Marello will be enjoined from pursuing her state court claim until after arbitration.

ORDER

AND NOW, this 3rd day of October, 2000, in consideration of the Motion to Compel Arbitration and Stay Court Proceedings filed by the Plaintiff, Central Reserve Life Insurance Company (Doc. No. 2), the response of the Defendant, Dorothy A. Marello, Plaintiff's reply, and the various sur-replies thereto filed by the parties, it is ORDERED that the motion to compel arbitration is GRANTED. Defendant is ENJOINED from participating in the state court proceeding until the completion of arbitration.

BY THE COURT:

JAMES McGIRR KELLY, J.

Footnotes

[1] Marello v. Central Reserve Life Insurance Company, et al., No. CI-00-05769.

[2] Diversity exists in the instant action between Plaintiff, Central Reserve, and Defendant, Marello. Central Reserve could not remove Marello's state court case to federal court, however, as that related case named several defendants with the same citizenship as Marello, the plaintiff in that action. See *Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc., 1998 U.S. Dist. LEXIS 6955, 1998 WL 252353* *2 (E.D. Pa. May 11, 1998).

[3] Even if a Pennsylvania court ruled that Marello's bad faith claim was not arbitrable, arbitration of her other claims

should proceed because the FAA requires piecemeal litigation if necessary to effectuate a valid arbitration agreement. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).*

CIVIL ACTION No. 00-3344

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRAL RESERVE LIFE INSURANCE COMPANY

v.

DOROTHY A. MARELLO

Jauary 17, 2001, Decided

January 17, 2001, Filed

COUNSEL:
For CENTRAL RESERVE LIFE INSURANCE COMPANY, PLAINTIFF: GEORGE C. WERNER, JR., BARLEY, SNYDER, SENFT & COHEN, LANCASTER, PA USA.

For DOROTHY A. MARELLO, DEFENDANT: ERIC L. KEEPERS, RODA AND NAST, P.C., LANCASTER, PA USA. JAMES G. FAHEY, THOMAS H. WILSON, R. GERALD BARRIS, SORLING NORTHRUP HANNA, ET AL, SPRINGFIELD, IL USA.

JUDGES:
JAMES McGIRR KELLY, J.

OPINIONBY:
JAMES McGIRR KELLY

OPINION:

MEMORANDUM AND ORDER

J. M. KELLY, J.

January 17, 2001

Presently before the Court is a Motion to Amend and Correct this Court's Order of October 3, 2000, filed by the Defendant, Dorothy A. Marello ("Marello"). Marello has health insurance coverage through the Plaintiff, Central Reserve Life Insurance Company ("Central Reserve"). Marello sought medical treatment that Central Reserve refused to cover. Marello subsequently filed suit in state court to compel Central Reserve to cover the cost of her treatment. Central Reserve filed suit in federal court to compel Marello to arbitrate her claims pursuant to an arbitration clause contained in her insurance policy. The Court granted Central Reserve's motion on October 3, 2000. Marello now asks the Court to amend and correct that Order pursuant to Federal Rule of Civil Procedure 59(e). For the following reasons, Marello's motion is denied.

I. BACKGROUND

Central Reserve, an Ohio corporation registered to transact business in Pennsylvania, sells medical insurance policies to individuals and small groups. Central Reserve issued an individual preferred provider medical indemnification policy ("Insurance Policy") to Marello, a Pennsylvania citizen who resides in Lancaster, Pennsylvania. Marello filled out an application for insurance that stated, directly above her signature, that "any disputes arising under the Policy are subject to an appeals procedure, including arbitration, which may be binding, depending on state law." The Insurance Policy issued to Marello contained an arbitration provision that reads:

> After exhaustion of the Appeal of Decision procedures, any dispute arising out of or related to the Policy that remains shall be settled by arbitration in accordance with applicable federal or state laws and the Insurance Dispute Resolution Procedures, as amended, and administered by the American Arbitration Association . . . .

Marello signed the Insurance Policy below the arbitration clause. Marello asserts, however, that Central Reserve neither told her to read the clause nor instructed her as to its effect.

In April of 1999, Marello was diagnosed with primary amyloidosis. Marello underwent chemotherapy, which Central Reserve covered. Marello then sought treatment at the Mayo Clinic in Rochester, Minnesota. In December, 1999, Marello's doctors proposed treating her with high dose chemotherapy with peripheral stem cell rescue. Central Reserve considered this treatment experimental and notified Marello that the Insurance Policy did not cover it.

Marello disagreed with Central Reserve and proceeded through an administrative appeal process. Despite the arbitration clause in her Insurance Policy, Marello filed a complaint in the Court of Common Pleas of Lancaster County, Pennsylvania on June 6, 2000.[1] Marello sought an injunction ordering Central Reserve to pay for her proposed medical treatment and also alleged, among other things, fraud and bad faith. On June 30, 2000, Central Reserve filed with this Court a Complaint and Motion to Compel Arbitration and Stay State Court Proceedings, which contended that the Insurance Policy, pursuant to the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1* et seq. (1994), required Marello to arbitrate rather than litigate her claims. While this Court considered the merits of that Motion to Compel, Central Reserve filed its Preliminary Objections to Marello's state court Complaint on July 5, 2000. Central Reserve raised these objections after invoking the FAA in its federal suit before this Court. Those objections raised, in part, the arbitrability of Marello's claims under the FAA. The state court judge assigned to that case overruled Central Reserve's Preliminary Objections on September 20, 2000. On October 4, 2000, however, this Court granted Central Reserve's Motion to Compel Arbitration. Marello then filed a Motion to Amend and Correct this Court's Order of October 3, 2000, which the Court will now consider.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) of the United States District Court for the Eastern

District of Pennsylvania allow parties to file motions for reconsideration or amendment of a judgment. These motions should be granted sparingly. A motion should only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to correct a clear error or prevent manifest injustice. See, e.g., *General Instrument Corp. v. Nu-Tek Electronics, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998)*, aff'd, *197 F.3d 83 (3d Cir. 1999); Environ Prods., Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1996)*. A change of law is considered controlling on a district court when the change comes from the United States Supreme Court or the United States Court of Appeals that contains that district. *North River Ins. v. CIGNA Reins. Co.,c 52 F.3d 1194, 1219-20 (3d Cir. 1995)*. Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. See *Burger King Corp. v. New England Hood and Duct Cleaning Co., 2000 U.S. Dist. LEXIS 1022* (E.D. Pa. Feb. 4, 2000).

III. DISCUSSION

Marello points to no changes in controlling law since the Court's Order of October 3, 2000.[2] Nor does Marello point to any relevant new evidence that has since become available.[3] Accordingly, Marello's motion turns on whether the Court committed clear error.

To show clear error, Marello invokes several arguments she already made in opposition to Central Reserve's Motion to Compel. None of these arguments is persuasive. For example, Marello asks the Court to reconsider its reading of *Shadduck v. Christopher J. Kaclik, Inc., 713 A.2d 635 (Pa. Super. Ct. 1998)* and *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, and suggests that Marello's state court Complaint did indeed specifically allege fraud in the inducement regarding the arbitration clause of the Insurance Policy. Marello has failed to convince the Court that its reading of Shadduck was clearly erroneous,[4] that Younger abstention is appropriate,[5] or that her state court Complaint alleged fraud in the inducement of the arbitration clause itself.[6] Marello's Motion to Amend does, however, present two interesting arguments, which the Court will

examine at length. First, Marello suggests that no federal court has the authority to issue an arbitral antisuit injunction. Second, Marello contends that, under the Rooker-Feldman doctrine, this Court lacked subject matter jurisdiction to issue such an injunction.

A. Arbitral Antisuit Injunctions

Marello contends that federal courts may not issue injunctions that stay court proceedings pending arbitration, so called "arbitral antisuit injunctions."[7] The authority of federal courts' to issue injunctions derives from the All Writs Act, *28 U.S.C. § 1651*(a) (1994), which states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The federal courts' seemingly broad power to issue writs is limited, however, by the Anti-Injunction Act ("AIA"), *28 U.S.C. § 2283* (1994), which states "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In the instant case, the Court enjoined a state court proceeding pursuant to the Federal Arbitration Act ("FAA"), *9 U.S.C. § § 1*-307 et seq. (1994). That Act of Congress does not expressly authorize the issuance of arbitral antisuit injunctions. Nevertheless, such injunctions are necessary in aid of a federal court's jurisdiction, promote the federal policy favoring arbitration, and preserve the integrity of arbitration. See, e.g., *Specialty Bakeries, Inc. v. RobHal, Inc., 961 F. Supp. 822, 829-31 (E.D. Pa. 1997)*, aff'd as modified and remanded sub nom. *Specialty Bakeries, Inc. v. HalRob, 129 F.3d 726 (3d Cir. 1997)*. But see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)* (reserving the question of whether AIA precludes federal courts from issuing arbitral antisuit injunctions). Indeed, allowing a state court suit to proceed on these facts "would eviscerate the arbitration process and make it a 'hollow formality,' with needless expense to all concerned." *Specialty Bakeries, 961 F. Supp.*

at 830 (citing *United States v. District of Columbia, 210 U.S. App. D.C. 87, 654 F.2d 802, 810 (D.C. Cir. 1981)).* Accordingly, this Court has the authority under the FAA to stay state court proceedings pending arbitration. See generally *Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997)* (affirming without discussion court's issuance of arbitral antisuit injunction). This Court's issuance of an arbitral antisuit injunction was not in error.

B. The Rooker-Feldman Doctrine

Marello also contends that, under the Rooker-Feldman doctrine, this Court lacked subject matter jurisdiction to impose such an injunction even if it otherwise had the statutory power to do so. Although Marello failed to raise the Rooker-Feldman doctrine prior to the instant Motion to Amend, she may nonetheless raise it now because it calls into question the subject matter jurisdiction of this Court.[8] *Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 137 (2d Cir. 1997); Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996); Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993).*

Federal law vests the United States Supreme Court with exclusive subject matter jurisdiction to review the decisions of the highest state courts for compliance with the United States Constitution. *28 U.S.C. § 1257* (1994) ("Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court. . . ."). Because the Supreme Court has exclusive jurisdiction in these matters, the lower federal courts, by implication, do not. Against the statutory backdrop that lower federal courts do not have jurisdiction over direct appeals from state court rulings, the Rooker-Feldman doctrine instructs that lower federal courts cannot exercise jurisdiction over the functional equivalent of such an appeal. See, e.g., *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923).* Specifically, lower federal courts cannot engage in appellate review of state court determinations or

constitutional claims that have been previously adjudicated in any state court, or claims that are "inextricably intertwined" with such claims because ruling on them would effectively void or reverse as erroneous a related state court decision. *Gulla v. North Strabane Township, 146 F.3d 168, 170 (3d Cir. 1998).* Although the language of *28 U.S.C. § 1257* applies only to final judgments of a state's highest court, the Rooker-Feldman doctrine has been extended to apply to the decisions of lower state courts, even decisions that are interlocutory in nature. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod's Liab. Litig., 134 F.3d 133, 143 (3d Cir. 1998); Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of New York and New Jersey Police Dep't, 973 F.2d 169, 177-78 (3d Cir. 1992).* Consequently, if a litigant in federal court seeks relief that would effectively void or reverse a related state court decision, the lower federal courts have no jurisdiction over the subject matter of that claim.[9]

Of the few federal courts to consider the application of the Rooker-Feldman doctrine to the issuance of arbitral antisuit injunctions, all would agree that a federal court may issue such an injunction when a federal petition is filed before a state action. Issuing an arbitral antisuit injunction is also proper if, although the state action preceded the federal one, the federal court rules before a state court rules on the merits. There is also general agreement that federal courts should not issue such an injunction if the state court issues a ruling on the merits before the federal complaint is filed. In other words, if the federal complaint is filed in response to an adverse state court ruling, it should be considered an impermissible appeal of that ruling. See *Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000); International Cement Aggregates, Inc. v. Antilles Cement Corp., 62 F. Supp. 2d 412, 415 (D. Puerto Rico 1999).*

This case, however, presents the situation where a federal complaint is filed after a state court complaint, but the state court rules on the merits before the federal court. Moreover, Central Reserve filed its Petition to Compel several says before filing its Preliminary Objections in state court. Under these facts, issuing an arbitral antisuit injunction is proper.

See *Distajo, 107 F.3d at 138.* Filing a petition for an arbitral antisuit injunction before a state court rules on the merits renders the Rooker-Feldman bar inapposite because the federal petition cannot be characterized as an appeal. See id.; see also *Brown & Root, 211 F.3d at 202* (noting that, unlike Distajo, "[the] federal petition comes on the heels of the state court's rejection of practically the same motion"); *International Cement Aggregates, 62 F. Supp. 2d at 415* (same). The Distajo decision is well reasoned because a contrary outcome would encourage a rush to judgment whereby the quicker court would win jurisdiction over the claim. Although the Distajo decision would seem to encourage litigants to file immediate federal claims in an effort to hedge their state court bets, this result seems preferable to determining courts' jurisdiction merely by the timing of their orders.

In the instant case, Marello filed her state court Complaint on June 6, 2000. Central Reserve promptly filed its federal Complaint and Motion to Compel Arbitration on June 30, 2000. Facing potential default judgment against it, Central Reserve filed its Preliminary Objections in state court on July 5, 2000. The state court judge overruled Central Reserve's Preliminary Objections on September 20, 2000. This Court then ruled on Central Reserve's Motion to Compel on October 3, 2000.

Although this Court's Order of October 3, 2000 succeeded the state court's denial of Central Reserve's Preliminary Objections, Central Reserve's Complaint and Motion to Compel preceded it. Central Reserve filed the instant Complaint and Motion to Compel Arbitration almost three months before any decision on the merits by the state court, and several days before its Preliminary Objections in state court. At the time it was filed, Central Reserve's Motion to Compel Arbitration was neither a direct appeal from an adverse state ruling, nor the functional equivalent thereof. Indeed, there was no ruling on the merits from which to appeal. See *Distajo, 107 F.3d at 138.* Because the filing of a state court complaint does not in and of itself implicate the Rooker-Feldman doctrine, this Court has subject matter jurisdiction over this matter. Accordingly, Marello's Motion to

Amend and Correct this Court's Order of October 3, 2000, is denied.[10]

ORDER

AND NOW, this 17th day of January, 2001, in consideration of the Defendant's Motion to Amend and Correct this Court's Order of October 3, 2000 (Doc. No. 18), Plaintiff's Response (Doc. No. 23), Defendant's Reply (Doc. No. 24), and the parties' various supplemental memoranda (Doc. Nos. 21, 22, 26 and 27), it is **ORDERED** that:

1. Defendant's Motion to Amend and Correct this Court's Order of October 3, 2000 (Doc. No. 18) is **DENIED**.

2. Defendant's Motion to Dismiss Plaintiff's Motion to Compel Arbitration and Stay State Proceedings (Doc. No. 4) is **DENIED**.

3. All parties are **ENJOINED** from participating in the related state court proceeding.

BY THE COURT:

JAMES McGIRR KELLY, J.

Footnotes

[1] Marello v. Central Reserve Life Insurance Company, et al., No. CI-00-05769.

[2] Marello filed supplemental memoranda that brought *Thermo-Sav, Inc. v. Bozeman, 2000 Ala. LEXIS 425, No. 99-155, 2000 WL 1520276* (Ala. Oct. 13, 2000) and *Brown & Root, Inc. v. Breckenridge, 211 F.3d 194 (4th Cir. 2000)* to the Court's attention. These cases are not controlling on this Court. They may, however, be persuasive, and the Court will therefore consider them in determining whether clear error exists.

[3] Marello cites many facts that the alternate dispute resolution procedures of the Insurance Policy are no longer in effect, and therefore impossible to effectuate. Marello

already cited such facts, however, in support of her Motion to Dismiss.

[4] The Court found that Marello could arbitrate her bad faith claims under Pennsylvania law. See *Shadduck, 713 A.2d at 638-39; Nealy v. State Farm Mut. Auto. Ins. Co., 695 A.2d 790, 792-94 (Pa. Super. Ct. 1997)*. For purposes of this Motion to Amend, the Court's finding was not clearly erroneous. First, federal courts are not bound by intermediate appellate state courts in determining state law issues in diversity cases. *McGowan v. University of Scranton, 759 F.2d 287, 291 (3d Cir. 1985)*. Moreover, even if Marello could not arbitrate her bad faith claim, arbitration of her other claims should nonetheless proceed because the FAA requires piecemeal litigation if necessary to effectuate a valid arbitration agreement. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)*.

[5] Younger abstention is inappropriate because this Court's refusal to compel arbitration would effectively nullify Central Reserve's federal statutory rights under the FAA. See, e.g., *Olde Discount Corp. v. Tupman, 1 F.3d 202, 213 (3d Cir. 1993)*.

[6] See, e.g., *Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903 n.7 (3d Cir. 1997); Audio Video Ctr., Inc. v. First Union Nat'l Bank, 84 F. Supp. 2d 624, 627 (E.D. Pa. 2000); Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (Pa. 1983)*.

[7] Although Marello already raised this point in her opposition to Central Reserve's Motion to Compel, she now contends that the Court's issuing such an injunction constituted clear error. While motions for reconsideration are not intended as a means of affording unhappy litigants a second bite at the apple, the Court recognizes that this area of the law is, at best, unsettled. The Court will therefore review its decision for the existence of plain error.

[8] Because Marello did not raise this issue and the Court did not rule on it, the Court will treat her argument as, in

essence, a motion to dismiss for lack of subject matter jurisdiction rather than a motion for reconsideration.

[9] Habeus corpus petitions, or actions sounding in habeas corpus, are excepted from the Rooker-Feldman bar. *Plyler v. Moore, 129 F.3d 728, 732 (4th Cir. 1997).*

[10] The Court will also deny Marello's Motion to Dismiss Central Reserve's Motion to Stay Court Proceedings. On October 3, 2000, the Court granted Central Reserve's Motion to Compel Arbitration but neglected to deny Marello's Motion to Dismiss that Motion. The Court will do so now. Moreover, in order to clarify its October 3, 2000 Order, the Court will enjoin all parties, not merely Marello, from participating in the related state court action.

IN THE COURT OF COMMON PLEAS OF LANCASTER
COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

No. C1-00-05760

DOROTHY A. MARELLO

v.

CENTRAL RESERVE LIFE INS. CO.,
a corporation, and
TIMOTHY S. NISSLY, d/b/a FIMG

(Entered and Filed September 20, 2000)

ORDER

AND NOW, this 20th day of September, 2000, upon consideration of the preliminary objections of defendant Central Reserve Life Insurance Co., plaintiffs responses thereto and the briefs filed by the parties, it is hereby ORDERED that defendant's preliminary objections are overruled. Plaintiffs complaint as stated sets forth a cause of action. It is unclear from the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff.

It is further ORDERED that plaintiff shall be permitted to amend her claim for intentional infliction of emotional distress to add allegations of physical harm. This amended complaint shall be filed within ten (10) days of the date of this order.

Defendant shall file an answer to plaintiffs complaint within twenty (20) days of the filing of the amended complaint.

BY THE COURT:

LAWRENCE F. STENGEL JUDGE

ATTEST:

Copies to: Joseph F. Rode. Esquire George C. Werner, Esquire
Robert J. Reger, Esquire

Supreme Court U.S.
FILED
JUL 1 2002
OFFICE OF THE CLERK

No. 01-1741

In the

Supreme Court of the United States

DOROTHY A. MARELLO,

Petitioner,

v.

CENTRAL RESERVE LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CENTRAL RESERVE LIFE INSURANCE COMPANY

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COUNTER STATEMENT OF THE QUESTION FOR REVIEW

The U.S. District Court for the Eastern District of Pennsylvania directed Petitioner Dorothy A. Marello to proceed to arbitration to resolve her dispute with Respondent Central Reserve Life Insurance Company regarding a determination of benefits under a medical expense insurance policy. The policy included an express and explicit arbitration agreement. The U.S. Court of Appeals for the Third Circuit affirmed the decision in a Memorandum Opinion, adopting the trial court's reasoning. The only legitimate issue raised by this Petition is:

- WHETHER THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT REVERSIBLY ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF A MOTION TO COMPEL ARBITRATION, WHERE PETITIONER FAILED TO MAKE ANY SHOWING IN THE DISTRICT COURT THAT ARBITRATION WOULD BE PROHIBITIVELY EXPENSIVE?

TABLE OF CONTENTS

COUNTER STATEMENT OF THE QUESTION FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

I. PETITIONER HAS NOT PRESENTED ANY COMPELLING REASON WHICH WOULD WARRANT REVIEW BY THE SUPREME COURT ON THE ISSUE OF PROHIBITIVE COSTS 6

A. There is no Conflict in the Circuit Courts Over the Application of this Court's Decision in *Green Tree* 6

B. The District Court's Finding that Marello Failed to Sustain Her Burden of Proving that the Costs of Arbitration were "Prohibitively Expensive," and the Third Circuit's Affirmance of that Decision, were Proper 10

II. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S DECISION REGARDING THE NEED FOR DISCOVERY AND/OR AN EVIDENTIARY HEARING WAS PROPER 12

III. THE INSTANT CASE IS AN IMPROPER VEHICLE FOR RESOLVING THE ISSUE OF HOW COURTS SHOULD DEAL WITH AN INVALID ARBITRATION PROVISION IN A CONTRACT IN THE ABSENCE OF A SEVERANCE CLAUSE 16

IV. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S FINDING THAT *ROOKER-FELDMAN* DOES NOT APPLY WHERE THE PETITION TO COMPEL ARBITRATION IS FILED BEFORE THE STATE COURT'S RULING ON THE ISSUE OF ARBITRABILITY WAS IN ACCORDANCE WITH EXISTING LAW 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Abbot Laboratories v. Gardner, 387 U.S. 136 (1967)..... 18

Ball v. SFX Broadcasting, Inc., 165 F.Supp. 2d 230 (N.D.N.Y. 2001)..... 9

Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002)..... 14, 15

Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102 (1974)..... 17

Boyd v. The Town of Hayneville, Alabama, 144 F.Supp. 2d 1272 (M.D. Ala. 2001)..... 9

Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001)..... 7, 8

Brown & Root, Inc. v. Breckenridge, 211 F.3d 194 (4th Cir. 2000)..... 19

Dabney v. Option One Mortgage Corp., 2001 WL 410543 (E.D. Pa. April 19, 2001)..... 9

Doctor's Associates, Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997)..... 19

Goral v. Fox Ridge, Inc., 683 A.2d 931 (Pa. Super. 1996)..... 19

Green Tree Financial Corp. - Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000)..... 5, 6, 7, 14

Klinedinst v. Tiger Drylac, USA, Inc., 2001 WL 1561821 (D.N.H. Nov. 28, 2001)..... 8

Livingston v. Associates Finance, Inc., 2001 WL 709465 (N.D. Ill. June 25, 2001) 14, 15

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 17

Manuel v. Honda R&D Americas, Inc., 175 F.Supp.2d 987 (S.D. Ohio 2001) 8

Miree v. DeKalb County, Ga., 433 U.S. 25 (1977) 16

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 10

Perez v. Globe Airport Security Services, Inc., 253 F.3d 1280 (11th Cir. 2001) 7

Phillips v. Associates Home Equity Services, Inc., 179 F.Supp.2d 840 (N.D. Ill. 2001) 9

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 14

Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 585 F.Supp. 770 (E.D. Pa. 1984) 19

Spinetti v. Service Corp. Int'l, 2001 WL 1781921 (W.D. Pa. Nov. 15, 2001) 9

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 17

United States v. Williams, 504 U.S. 36 (1992) 16

STATUTES

9 U.S.C. § 10 12

9 U.S.C. § 11 12

U.S. Sup. Ct. Rule 10, 28 U.S.C.A. 5, 10

42 Pa.C.S.A. § 8371 12

73 P.S. § 201-9.2 12

OTHER AUTHORITIES

Jason Bradley Kay, *The Post-Green Tree Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?*, 6 N.C. Banking Inst. 545 (2002) 8

Wright, Charles A., Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* 13A § 3532 (1984) 17

Green Tree Financial Corp. v. Alabama, Brief Amicus Curiae of the American Arbitration Association, 2000 WL 744161 (June 8, 2000) 12

COUNTER STATEMENT OF THE CASE

Respondent Central Reserve Life Insurance Company ("Central Reserve") sells medical expense insurance policies to individuals and small groups. Petitioner Dorothy A. Marello ("Marello") applied for an individual preferred provider medical indemnification policy from Central Reserve (the "Policy") on December 1, 1998. Immediately above where Marello signed the application form a conspicuous notice was printed stating that "any disputes arising under the Policy are subject to an appeals procedure, including arbitration, which may be binding, depending on state law." Marello claims that she did not read the application form when she signed it, despite language in the application form attesting that she had read it prior to signing. Marello testified that this language was not hidden from her when she signed; she merely chose not to read the document she signed. Indeed, Marello testified that at no time prior to this litigation had she read the application or the Policy.

In a letter dated December 24, 1998, Central Reserve informed Marello that her application for insurance had been approved with an effective date of December 1, 1998. Shortly thereafter, Marello received a copy of the Policy from Central Reserve. The letter accompanying the Policy instructed Marello to review the Policy and informed her that she could, within 15 days, void all coverage and receive a full refund of the premium paid if she were not satisfied with the insurance. The Policy contained a detailed description of Marello's insurance benefits and the arbitration provisions. The Policy clearly stated that arbitration was required for "[a]ny controversy arising out of or relating to the Policy, [including] disputes about the denial of a claim." Despite Central Reserve's instructions, Marello never examined the Policy to "ascertain the correctness of the schedule of benefits, limitations and exclusions." Instead, she conducted a cursory review of the Policy, and found no Policy provision to be inconsistent with her understanding of the kind of insurance she had intended to purchase.

In April of 1999, approximately four months after the policy became effective, Marello was diagnosed with primary amyloidosis. Marello underwent a regime of chemotherapy, the standard treatment for this disease and a treatment covered by the Policy. Marello was then referred to the Mayo Clinic in Rochester, Minnesota for further tests. In December of 1999, Marello's physicians recommended an alternate course of treatment – an experimental therapy that is not generally accepted by physicians in the United States as treatment for the condition of primary amyloidosis. This treatment consists of high dose chemotherapy with peripheral stem cell rescue. After review of the proposed treatment by an independent physician, Central Reserve concluded that the therapy was excluded under the Policy, based upon a determination that the course of treatment was experimental and not generally accepted within the medical community. Marello's treating physician and Marello herself were notified of the decision in a letter dated December 23, 1999.

Marello utilized the administrative appeal process set forth in the Policy to challenge the decision. Central Reserve had the proposed treatment plan reviewed by an independent, external medical review board. The review board reached the same conclusion as had the independent physician who initially reviewed the treatment. Accordingly, Central Reserve determined that the proposed treatment plan was not covered under the Policy, and Marello was so notified. Marello desired to appeal the matter further, and Central Reserve informed Marello of her right to proceed with arbitration, pursuant to the arbitration agreement in the Policy.

Marello was provided with a copy of Central Reserve's Arbitration Booklet; this publication contained the relevant fee schedule for arbitration of any dispute Marello might have with Central Reserve. With the exception of the filing fee (which Central Reserve ultimately agreed to pay), the fee schedule does not expressly place the burden of any arbitration costs and fees on the insured.

In violation of the clear language of the Policy, Marello never sought to arbitrate her dispute with Central Reserve. Instead, Marello filed a Complaint against Central Reserve in the Lancaster County Court of Common Pleas on June 6, 2000. In her state court action, Marello sought, *inter alia*, an injunction ordering Central Reserve to pay for the proposed treatment, as well as treble damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 Pa. C.S.A. §201-1, et seq.) and punitive damages based on Central Reserve's alleged fraud and bad faith (42 Pa.C.S. §8371). Before any formal proceedings in the state court action, Central Reserve agreed to pay for Marello's treatment on humanitarian grounds.[1]

Although Central Reserve agreed to pay for the treatment, Marello expressed her intention to continue the state court action. Central Reserve then promptly initiated an action in federal court to stay the state court proceedings and compel arbitration. Central Reserve filed its Petition to Compel Arbitration in the United States District Court for the Eastern District of Pennsylvania on June 30, 2000. Since the state court proceedings were not immediately stayed, Central Reserve filed Preliminary Objections in state court on July 5, 2000, to protect its rights and prevent a default judgment from being entered against it. The state court dismissed the Preliminary Objections on September 20, 2000, before the district court granted Central Reserve's Petition to Compel, but well after the parties had submitted briefs to district court on the merits of the Petition. On preliminary objections, the state court held only that it was "unclear from

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[1] Central Reserve did expressly reserve its rights to assert all policy limitations, exclusions and/or provisions in any action brought against it. However, contrary to Marello's assertion, Central Reserve is not seeking and cannot seek repayment of the costs of treatment from Marello. Central Reserve reserved only defensive rights.

With Central Reserve's agreement to pay, Marello received high dose chemotherapy with peripheral stem cell rescue treatment in June of 2000. There has been no suggestion that the effectiveness of the treatment was in any way compromised or diminished as a result of the brief delay between the time it was first recommended and when Marello ultimately received the treatment.

the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff." Central Reserve appealed to the Superior Court of Pennsylvania on September 27, 2000.

On October 3, 2000, the district court issued an opinion and order granting Central Reserve's Petition to Compel Arbitration and entering a stay in the state court action. Petitioner filed a Motion to Amend and Correct the district court's order on October 12, 2000. The district court denied that motion by opinion and order dated January 17, 2001.

Marello filed a Notice of Appeal in the United States Court of Appeals for the Third Circuit. On appeal, Marello argued, *inter alia*, that the district court erred in granting the Petition to Compel Arbitration because the filing fees and costs associated with arbitration were so excessive that they deprived Marello of due process of law. In the interim, Central Reserve agreed to pay the initial filing fees for arbitration. Under the applicable fee schedule for the dispute, the filing fees were the only costs that were required to be paid in advance of the arbitration hearing. The other fees and costs associated with arbitration are not billed until the hearing actually takes place, at which point, the arbitrators have the discretion to apportion the costs of arbitration between the parties as justice requires.

On December 20, 2001, the Third Circuit affirmed the district court's grant of Central Reserve's Petition to Compel Arbitration and the denial of Marello's Motion to Amend and Correct the order compelling arbitration "substantially" for the reasons set forth in district court's opinions. Thereafter, Marello filed a Petition for Panel Rehearing and for En Banc Determination. On February 26, 2002, the Third Circuit denied Marello's Petition and the instant Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

Contrary to Marello's assertion that this case provides the Court with an opportunity to answer a question not specifically resolved in *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513 (2000) – how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence – this case presents nothing more than the same factual scenario presented in *Green Tree*. Contrary to Marello's suggestion that this case presents important federal questions that have not been but should be settled by this court, Marello is simply challenging the national policy, as recognized by this Court, favoring arbitration.

In *Green Tree*, this Court reaffirmed its commitment to arbitration as an appropriate, at times desirable, method of resolving disputes. Marello suggests in this Petition that the costs associated with arbitrating her claim effectively precluded her from vindicating her rights through arbitration. However, in the district court, Marello did not establish anything more than the "risk" that she will be required to bear prohibitive arbitration costs. This Court expressly held in *Green Tree* that a showing of "risk" is too speculative. 121 S.Ct. at 522. Furthermore, Marello's argument of prohibitive costs in arbitration is nonsensical when viewed in the context of the extensive litigation activity she has pursued.

Additionally, the instant case does not present any other "compelling reasons" for the exercise of the Court's discretionary certiorari jurisdiction. The lower courts fully considered and correctly decided the issues relating to the enforceability of the arbitration agreement at issue. Marello asks this Court to do what would amount to nothing more than review the lower courts' factual determinations and application of the law. It is well settled that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See* U.S. Sup. Ct. Rule 10. Equally important, the key considerations on certiorari – a

conflict among the circuit courts or an important question of federal law – are absent in this case. Accordingly, the petition for writ of certiorari should be denied.

I. PETITIONER HAS NOT PRESENTED ANY COMPELLING REASON WHICH WOULD WARRANT REVIEW BY THE SUPREME COURT ON THE ISSUE OF PROHIBITIVE COSTS.

In *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 521-22 (2000), this Court upheld the validity of arbitration agreements while also holding that a party seeking to invalidate an arbitration agreement on the ground of prohibitive expense has the burden of showing the likelihood of incurring such arbitration costs. *Id.* at 521-22. As set forth below, Marello has not identified any division or disagreement among the courts of appeals as to what constitutes prohibitive costs or shown that the courts are otherwise having difficulty applying the rule set forth in *Green Tree*. Nor has Marello shown a compelling reason for this Court to reconsider the conclusion reached by both the district court and Third Circuit, based on the factual evidence presented, that Marello did not satisfy her burden of showing a likelihood of actually incurring costs of arbitration which are so excessive that they would preclude her from effectively vindicating her rights.

A. There is No Conflict in the Circuit Courts over the Application of this Court's decision in *Green Tree*.

In *Green Tree*, this Court placed the burden of proving that arbitration would be "prohibitively expensive" on the party seeking to invalidate the arbitration agreement. *Green Tree*, 121 S.Ct. at 522. Admittedly, this Court did not discuss "how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence." Nevertheless, this Court did provide a roadmap of the type of evidence which would be required to

support a finding of prohibitive expense. For instance, the Court expressly noted that the burden cannot be met by a hypothetical showing of what arbitration could possibly cost the plaintiff. *Id.* at 522 n.6. Such "unsupported statements provide no basis on which to ascertain the actual costs and fees to which she would be subject to in arbitration." *Id.* Rather, to meet the burden, the party opposing arbitration must demonstrate that, in her particular case, the expenses would be charged to her and would prevent her from being able to pursue her claims in the arbitral forum. The Court listed examples of relevant evidence being "information about how claimants fare" under the particular arbitration clause, the name of the organization that would conduct the arbitration, the fees that it charges, and who will be charged. *Id.* at 522.

Marello attempts to manufacture a compelling reason for review by this Court in arguing that there is a split among the courts as to what constitutes the proper approach for determining whether a party opposing arbitration has met the burden of proving prohibitive expense. However, careful review of the cases following *Green Tree* reveals that there is no such division.[2]

Guided by this Court's roadmap, the lower courts have shown no difficulty in applying the holding in *Green Tree*. The courts of appeals that have addressed the issue of prohibitive costs, post-*Green Tree*, have rejected a *per se* prohibition against an arbitration provision that might impose prohibitive costs on an individual in favor of a case-by-case approach. *See Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1284-85 (11th Cir. 2001) (court implicitly rejected *per se* approach in favor of case-by-case analysis, but did not determine whether

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[2] Several of the cases cited by Marello as creating a conflict were decided **before** *Green Tree*. Since these cases pre-date *Green Tree*, they neither form the basis for a division in the courts over how to apply *Green Tree*'s burden of proof nor create a compelling reason for granting review in this case.

evidence was sufficient to find arbitration prohibitively expensive because agreement was found to be unenforceable for other reasons). *See also* Kay, Jason Bradley, *The Post-Green Tree Evidentiary Standard for Invalidating Arbitration Clauses in Consumer Lending Contracts: How Much Justice Can You Afford?*, 6 N.C. Banking Inst. 545, 564-65 (2002) (noting commitment on the part of post-*Green Tree* courts to resolving the issue of whether there are prohibitive costs on a case-by-case basis).

In *Bradford*, the Fourth Circuit, relying on this Court's decision in *Green Tree*, explained that although "fee splitting can render an arbitration agreement unenforceable where the arbitration fees . . . are so prohibitive as to effectively deny the [claimant] access to the arbitral forum," a case-by-case analysis should be performed that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation, and whether the cost differential is so substantial as to deter the bringing of claims. 238 F.3d at 555-56. Thus, the "proper inquiry under *Gilmer* [and *Green Tree*] is not where the money goes but rather the amount of money that ultimately will be paid by the claimant," for a claimant cannot be deterred from vindicating statutory rights "simply by the fact that fees would be paid to the arbitrator where the overall cost of the arbitration is otherwise equal to or less than the cost of litigation in court." *Id.* at 556.

Additionally, although sometimes reaching different conclusions regarding the validity of an arbitration provision depending upon the particular facts at hand, the majority of district courts addressing the issue of prohibitive costs post-*Green Tree* have also favored a case-by-case approach. *See, e.g.*, *Klinedinst v. Tiger Drylac, USA, Inc.*, 2001 WL 1561821 at *13 (D.N.H. Nov. 28, 2001) (favoring case-by-case approach used in *Bradford* and other cases pre-dating *Green Tree*); *Manuel v. Honda R&D Americas, Inc.*, 175 F.Supp.2d 987, 994 (S.D. Ohio 2001) (*per se* invalidation of arbitration agreement due to presence of fee-splitting provision contradicts Supreme Court's declaration that party seeking to

avoid arbitration bears burden of proving likelihood of incurring prohibitively expensive costs; *Spinetti v. Service Corp. Int'l*, 2001 WL 1781921 (W.D. Pa. Nov. 15, 2001) (noting that court must look to the particular language pertaining to the payment of fees and costs, if any exists, as well as the actual costs and the claimant's financial situation in assessing enforceability of arbitration clauses); *Phillips v. Associates Home Equity Services, Inc.*, 179 F.Supp.2d 840, 847 (N.D. Ill. 2001) (inquiry must be determined on a case-by-case basis).

Even those district courts which have not specifically adopted the case-by-case approach suggested in *Green Tree* seem to at least implicitly utilize this analysis in reaching their decisions. *See, e.g., Dabney v. Option One Mortgage Corp.*, 2001 WL 410543 at *3-4 (E.D. Pa. April 19, 2001) (discussing different approaches, but ultimately considering plaintiff's financial circumstances and risk of plaintiff having to bear arbitration costs in determining validity of arbitration clause); *Boyd v. The Town of Hayneville, Alabama*, 144 F.Supp.2d 1272, 1279-80 (M.D. Ala. 2001) (same); *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001) (finding that claimant made showing that she could not afford to pay fees imposed under arbitration provision and likelihood that she would be responsible for these costs).

In *Green Tree*, this Court has offered all the guidance the lower courts need regarding the type of evidence a party opposing arbitration must present to meet its burden of proof. Given the already ample direction provided by this Court, and the absence of any confusion or conflict in the courts of appeals or the district courts over the approach to be used in determining prohibitive expense, further consideration of this issue at this juncture is unnecessary.

B. The District Court's Finding that Marello Failed to Sustain her Burden of Proving that the Costs of Arbitration were "Prohibitively Expensive," and the Third Circuit's Affirmance of that Decision, were Proper.

Failing to demonstrate a conflict among the lower courts on an important federal question, Marello also endeavors to persuade this Court that her individual claims of error have merit. When read in their proper context, Petitioner's arguments amount to little more than a complaint that the lower courts incorrectly found, based on the evidence presented, that Marello had not met her burden of proving prohibitive expense. However, such an allegation of error is alone not sufficient to warrant the "commitment of scarce judicial resources" that a grant of certiorari represents. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). *See also* U.S. Sup. Ct. Rule 10 (certiorari rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law).

In considering Marello's arguments regarding the alleged excessive cost of arbitration and her inability to pay, the role Marello's attorneys and, to some extent, Marello herself, have played in creating the present controversy cannot be over-emphasized. The undisputed facts of record in this case establish that Central Reserve agreed to pay for the treatment which saved Marello's life **over two years ago**. Additionally, Marello has not contended that the brief delay between the treatment recommendation and the actual receipt of treatment compromised or diminished the effectiveness of the treatment. Therefore, as opposed to the typical situation in which a plaintiff pursues claims against an insurance company that has refused to provide coverage, in this case, Marello received the treatment and all the insurance benefits to which she was even arguably entitled.

The only reason a Petition for Writ of Certiorari is sought is to allow Marello and her attorneys to pursue in

court bad faith and consumer protection claims against Central Reserve, presumably to recover attorneys' fees expended in litigating these matters, the vast majority of which were incurred **after** Central Reserve agreed to provide coverage to Marello. Marello's claims will do nothing to obtain or expand insurance benefits, and, in fact, will only serve to provide Marello and her attorneys with a windfall. Furthermore, Marello's attorneys, ignoring the obvious irony of their statements, have maintained throughout this litigation that the high costs associated with arbitration would effectively preclude Marello from vindicating her rights under the law. Despite significant efforts to portray her as a financially strapped, nearly helpless individual, Marello's claimed lack of resources has not impeded her ability to litigate in the trial courts of the state and federal systems, the state and federal appellate courts and now in the highest court in the land. Throughout these federal and state litigations, Marello has vigorously asserted her rights without regard to the cost involved. Asking this Court to grant certiorari on the alleged prohibitive cost of arbitration seems in the view of these litgations something of a non sequitur.

Turning briefly to the merits, even assuming Marello made a proper showing of prohibitive expense, she did not show any likelihood that the alleged costs would actually be imposed upon her. Nor did Marello show that the expenses would have prevented her from vindicating her rights in the arbitral forum. Rather, Marello did little more than build supposition upon supposition. In contrast, Central Reserve presented specific evidence to show that Petitioner would not necessarily incur any expenses associated with arbitration that she would not have also incurred had she litigated the case in court. Central Reserve established that the only cost Marello absolutely would have been required to pay "up front" was the filing fee ($500 - $1,000). Central Reserve agreed to assume the obligation of paying Marello's AAA filing fees. Consequently, the up front cost to Marello of proceeding in the arbitral forum was limited to attorneys' fees and costs, expenses she would have borne whether she arbitrated her claims or proceeded in court. The AAA rules

provided that additional costs, i.e. arbitrator compensation, travel expenses, hearing fees, etc., were to be allocated at the conclusion of the arbitration.[3] If Marello had a genuine financial hardship, she could have presented this hardship argument to the arbitration panel. When hardship is substantiated, AAA liberally grants requests for waiver or deferral of administrative fees. *See Green Tree Financial Corp. v. Alabama*, Brief Amicus Curiae of the American Arbitration Association, 2000 WL 744161 at *16 (June 8, 2000).

At most, Marello demonstrated a "risk" that she might be encumbered with prohibitive arbitration costs. Under *Green Tree*, the mere "risk" of being saddled with prohibitive costs is too speculative to require the invalidation of the arbitration clause in Marello's policy. Therefore, the district court's implicit conclusion that Marello did not meet her burden of proof in this case, and the Third Circuit's affirmance is soundly based and does not warrant review.

II. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S DECISION REGARDING THE LACK OF NEED FOR DISCOVERY AND/OR AN EVIDENTIARY HEARING WAS PROPER.

Marello alternatively urges this Court to grant review to address and resolve the issue of the availability and scope of discovery that should be afforded a party opposing arbitration. Petitioner argues that this Court, in *Green Tree*, clearly implied that discovery would be available to a party

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[3] The AAA rules applicable to this case provide that filing and administrative fees and costs are subject to final apportionment by the arbitrator. Additionally, under Pennsylvania's Unfair Trade Practices and Consumer Protection Law and "bad faith" statutes, a prevailing plaintiff can be awarded attorneys' fees and costs. *See* 42 Pa.C.S.A. §8371; 72 P.S. §201-9.2. Given these provisions for the award of fees and costs, Marello's contention that she might be required to bear substantial costs of the arbitration is too speculative to render the arbitration provision unenforceable. Even if the arbitrator ultimately were to rule in Marello's favor, but then deny her the costs of the action, Marello still could pursue post-arbitration review of the award under the FAA. *See* 9 U.S.C. §§10, 11.

opposing arbitration so he or she could demonstrate whether arbitration would allow that party to effectively vindicate his or her statutory rights. Pet. 20. In considering this argument, it is essential to note a fact conveniently ignored by Marello. At no time did she ever request the opportunity to conduct discovery regarding the cost to arbitrate her claims.

Marello did not request discovery regarding the cost to arbitrate her particular case or the likelihood that she would be responsible for these costs. Rather, Marello's Request for Leave to Conduct Discovery, contained in her Motion to Dismiss Central Reserve's Petition to Compel Arbitration, clearly states that the discovery sought was for the purpose of assisting the district court **in the determination as to whether fraud occurred**. Marello was requesting the following:

a) All knowledge, memoranda, electronic data, documents, and correspondence with, or regarding, the AAA's abandonment of the Insurance Dispute Resolution Procedures, as amended, and administered by the AAA.

b) The average costs for insureds to arbitrate their disputes with CRL for the last five (5) years.

c) The number of insureds allowed to opt out of the arbitration provision for the last five years.

d) The identities and background of the arbitrators in the pool maintained by the AAA for administration of arbitration under its former "Insurance Dispute Resolution" and its commercial procedures.

> e) The identities, qualifications, documents relied upon and opinions of those individuals of the medical panel that participated in the denial [of] Ms. Marello's claim.

In the "Conclusion" of her Motion to Dismiss, Marello defines her need for discovery in terms of "supplementing" and further "verifying" her allegations of fraud.

Green Tree and the other cases cited by Marello make it clear that any discovery by a party seeking to invalidate an arbitration provision must be narrowly limited. *Green Tree*, 121 S.Ct. at 522-23; *Blair v. Scott Specialty Gases*, 283 F.3d 595, 609 (3d Cir. 2002) (finding that discovery should be limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay); *Livingston v. Associates Finance, Inc.*, 2001 WL 709465 at *2 (N.D. Ill. June 25, 2001) (limiting discovery to the likely costs that plaintiffs would incur in their particular case and refusing requests for general statistical information as irrelevant).

Marello's own statements belie her claim that she sought, and was denied, discovery aimed at establishing her burden of proof under *Green Tree*. Since Marello was not seeking, and did not ask the district court for, discovery relating to the issue of prohibitive costs, Petitioner has failed to raise a justiciable issue before this Court regarding the right of a party seeking to prove prohibitive expense under *Green Tree* to conduct pre-arbitration discovery.[4]

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[4] With regard to Petitioner's entitlement to discovery on the fraud issue, the District Court in its Opinion and Order dated October 3, 2000 noted that "a party can only avoid an arbitration clause if she specifically alleges that the arbitration clause itself was the product of fraudulent inducement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967). The District Court found that Marello's Complaint never specifically alleged that Central Reserve fraudulently induced her to agree to the arbitration clause. Given its finding that the issue was one for resolution by an arbitrator rather than the Court, the District Court correctly found that allowing discovery in the federal proceedings would be inappropriate.

Marello cites *Blair v Scott Specialty Gases*, *supra*, in support of her claim of entitlement to discovery. A careful reading of the Third Circuit's Opinion in *Blair* reveals that it actually supports Central Reserve's position. In *Blair*, while recognizing the right to "some discovery," the Court expressly stated that the discovery allowed should be limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay. *Blair*, 283 F.3d at 609. As set forth in greater detail below, Marello was already in possession of this information when Central Reserve initiated its action in federal court and thus was not entitled to any additional discovery.

In *Livingston v. Associates Finance, Inc.*, 2001 WL 709465 (N.D. Ill. June 25, 2001), another case cited by Marello, the court held that discovery should be "strictly limited to the likely costs that Plaintiffs will incur in this particular case if Plaintiffs are compelled to arbitrate as well as procedures regarding the waiving of fees and costs." *Id.* at *2. The court specifically directed that the discovery requests not include requests for general statistical information, because such information was irrelevant to the costs to be incurred in the specific case. *Id.*

In this case, the discovery requests proposed by Marello are not even arguably the type authorized by *Green Tree* and its progeny. They have no relevance to the cost to arbitrate this dispute or the likelihood that Marello would actually be held responsible for these costs if this case was arbitrated. Additionally, Marello was already in possession of all of the information to which the courts following *Green Tree* have determined a plaintiff is entitled. *See Blair*, *supra*; *Livingston*, *supra*. With regard to her ability to pay, Marello was fully aware of her own financial status and testified to the details thereof at her deposition. A copy of Marello's deposition transcript was submitted to the district court and the Third Circuit. Petitioner also knew the approximate costs of proceeding with arbitration in this case and provided the lower courts with this information. Marello had a copy of Central Reserve's Arbitration Booklet, which contained the

relevant fee schedule for arbitration. Additionally, by letter dated August 8, 2000, AAA provided Marello's attorneys with estimated arbitration costs and the rules that would be used to administer the arbitration.

Since Marello did not request, and was not entitled to, any additional discovery on the issue of costs, the Third Circuit's affirmance of the district court's decision to deny Petitioner's request for leave to conduct discovery was not inconsistent with its decision in *Blair*, nor did it conflict with the decision of this Court in *Green Tree*.

III. THE INSTANT CASE IS AN IMPROPER VEHICLE FOR RESOLVING THE ISSUE OF HOW COURTS SHOULD DEAL WITH AN INVALID ARBITRATION PROVISION IN A CONTRACT IN THE ABSENCE OF A SEVERANCE CLAUSE.

Petitioner alternatively asks this Court to grant certiorari to consider the issue of how courts should deal with an invalid arbitration provision in the absence of a severance clause. Specifically, Marello questions whether courts should "sever or rewrite offending arbitral provisions, strike the provision in its entirety or decide on a case-by-case basis how best to remedy the provision dependent upon the circumstances of the litigant" when a contract lacks a severance clause. Pet. 21. As an initial matter, this issue has not been previously raised, argued or briefed by Marello. Nor has the issue been passed upon in the proceedings before the district court or the Third Circuit. Therefore, this issue should not be considered for the first time by this Court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below"); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (where asserted basis of liability had not been pleaded, argued nor briefed either in federal district court or in court of appeals, it would not be considered by United States Supreme Court on grant of certiorari).

Furthermore, Central Reserve respectfully submits that this case is not the appropriate vehicle for resolving this issue because it is not ripe for adjudication. Ripeness is peculiarly a question of timing. *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 140 (1974). A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 (1984)). The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of repetitive litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990).

In this case, before the issue ever arises as to how an invalid arbitration provision should be handled by the courts when there is no severance clause in the agreement, the arbitration clause in the Central Reserve policy must necessarily be declared invalid. To date, there has been no finding by any court that the arbitration provision in the Central Reserve policy is invalid or unenforceable. The district court and the Third Circuit found the provision enforceable and compelled arbitration. Additionally, in ruling on Central Reserve's Preliminary Objections, the state court simply noted that it was "unclear from the language of the application that there was a knowing waiver and express agreement to arbitrate by plaintiff." The state court made no final determination regarding the validity, or lack thereof, of the arbitration clause at issue.

Furthermore, Marello has not identified any true confusion in the lower courts that would justify consideration of the issue by this Court. Central Reserve respectfully submits that determination by this Court of how courts should handle the inclusion of an invalid arbitration provision in a contract where no severance clause exists, in advance of any finding that the arbitration clause at issue is invalid,

involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Admittedly, ripeness requires the Court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Significantly, to withhold court consideration of this issue at this point will not cause the parties any hardship. Marello has already received treatment at Central Reserve's expense and has been relieved of the obligation to pay the costs associated with initiating arbitration. As such, there is no strong or compelling reason to address this issue now. Postponing consideration of the question presented until an actual controversy arises also has the advantage of permitting the lower courts further opportunity to consider the issue and develop an approach that is logical and consistent with existing law. Under the circumstances present, this issue is not ripe for adjudication by this Court.

IV. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S FINDING THAT *ROOKER-FELDMAN* DOES NOT APPLY WHERE THE PETITION TO COMPEL ARBITRATION IS FILED BEFORE THE STATE COURT'S RULING ON THE ISSUE OF ARBITRABILITY WAS IN ACCORDANCE WITH EXISTING LAW.

Marello's final argument for review is that the district court improperly usurped the state court's jurisdiction in this case by entering an order compelling arbitration after the state court denied Central Reserve's Preliminary Objections. In her Petition, Marello presents nothing more than a rehash of what was already extensively briefed, fully considered and correctly decided by the district court and the Third Circuit. Indeed, Marello does not even purport to identify any compelling reason or conflict among the lower courts that would justify consideration by this Court.

Despite Marello's assertion to the contrary, Central Reserve did not "simultaneously litigate" its attempt to compel arbitration in both state and federal courts. Far from it, Central Reserve's decision to file in federal court, and the actual filing of its Petition to Compel Arbitration, were made **before** the state court had issued any ruling in its case. Central Reserve filed its Petition to Compel Arbitration in federal court on June 30, 2000. Only after instituting the federal court action did Central Reserve file Preliminary Objections in the state court action. Even then, the sole reason Central Reserve filed Preliminary Objections was to preserve its rights and protect against a possible finding of waiver. *See Goral v. Fox Ridge, Inc.*, 683 A.2d 931, 934 (Pa. Super. 1996) (finding waiver of right to compel arbitration and rejecting assertion by company that it had raised existence of arbitration clause "promptly at every point" where preliminary objections were not filed: "If Appellants had truly wanted to invoke the arbitration process to preclude litigation, they could have done so by means of preliminary objections"); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 781 (E.D. Pa. 1984) (compelling arbitration when movant not dilatory in seeking arbitration in federal court notwithstanding movant's need to defend against previously-filed state court action).

As in *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126 (2d Cir. 1997), by filing in federal court, Central Reserve was not attempting to appeal from any state court decision. *Id.* at 138; *See also Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000) (distinguishing between the facts before it and a situation in which the party seeking arbitration sought prompt recourse to federal court in order to vindicate its rights under the FAA, with Rooker-Feldman not applying in the latter context). Although the district court's order of October 3, 2000 followed the state court's denial of Central Reserve's Preliminary Objections, Central Reserve's Complaint and Petition to Compel Arbitration preceded it by almost three (3) months. Since there had been no ruling of any type by the state court when the Petition to Compel Arbitration was filed, Central Reserve's act of filing

in federal court cannot be characterized as an appeal. Under these circumstances, the *Rooker-Feldman* doctrine does not operate to bar Central Reserve's selection of federal court as the forum to adjudicate the question of the arbitrability of Marello's claims.

CONCLUSION

Based on the above cited authorities and reasoning, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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